Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,

Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the standard of review for analyzing an Equal Protection challenge to a state law that discriminates against nonpermanent visaholding resident aliens is: (a) strict scrutiny, the standard applied by this Court in *In re Griffiths*, 413 U.S. 717 (1973) and by the Fourth Circuit in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), *aff'd sub nom., Toll v. Moreno*, 458 U.S. 1 (1982); (b) some other form of heightened scrutiny; or (c) rational basis review, as the Fifth Circuit applied below.

2. Whether Federal immigration law preempts state licensing regimes that categorically ban H-1B visa-holders from obtaining a state license, as the Supreme Court of Vermont held in *Dingemans v. Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989), or whether there is no preemption, as the Fifth Circuit held below.

PARTIES TO THE PROCEEDINGS BELOW

The parties below were: Caroline Wallace and Emily Maw, appellees; and Pascal F. Calogero, in his official capacity as Chief Justice of the Louisiana Supreme Court; Jeffrey P. Victory, Jeannette Theriot Knoll, Chet D. Traylor, Catherine D. Kimball, John L. Weimer, and Bernette J. Johnson, in their official capacities as Justices of the Louisiana Supreme Court; Daniel E. Webb, in his official capacity as Chairman of the Louisiana Commission on Bar Admissions; and Harry J. Phillips, Jr., in his official capacity as Vice-Chairman of the Commission, appellants.

This case was consolidated on appeal by the Fifth Circuit with *Leclerc v. Webb*, where the appellants were Karen Leclerc, Guillame Jarry, Beatrice Boulord, and Maureen D. Affleck, and the appellees were the appellants listed above, with the exception of Chief Justice Calogero, who was not a party to the *Leclerc* action.

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OPINIONS BELOW

The opinion of the court of appeals is reported at *Leclerc v. Webb*, 419 F.3d 405 (5th Cir. 2005), and is reprinted in the accompanying Appendix at 1a. The Fifth Circuit's denial of petitioners' petition for rehearing en banc and the opinions of the seven judges dissenting from the denial of rehearing en banc are reported at 444 F.3d 428 (5th Cir. 2006). *See* App. 73a. The opinion of the District Court is reported at *Wallace v. Calogero*, 286 F. Supp. 2d 748 (E.D. La. 2003). *See* App. 44a.

This case was consolidated on appeal by the Fifth Circuit with *Leclerc v. Webb*. The opinion of the District Court in *Leclerc* is reported at 270 F. Supp. 2d 779 (E.D. La. 2003). The Leclerc plaintiffs are also petitioning for a writ of certiorari and Petitioners respectfully request that the Court consider the petitions together.

JURISDICTION

The judgment of the Court of Appeals was entered on July 29, 2005. *See* App. 1a. Petitioners filed a timely petition for rehearing en banc on August 12, 2005. The Fifth Circuit denied the petition for rehearing over the dissents of seven members on March 27, 2006. *See* App. 73a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, the Supremacy Clause, U.S. Const. art. VI, and several provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, the pertinent text of which are set out in the accompanying Appendix at 82a.

STATEMENT OF THE CASE

This case presents important questions regarding the ability of States to discriminate against lawfully-admitted resident aliens.

Louisiana Bar Rule XVII, Section 3(B) ("Rule 3(B)") provides that every applicant for admission to the Bar must be "a citizen of the United States or a resident alien thereof." The Louisiana Supreme Court enforces Rule 3(B). In 2002, that Court reversed its decades-old prior interpretation and declared that "resident alien" referred only to aliens who were entitled to permanent residence in the United States. *Compare In re Bourke*, 819 So. 2d 1020, 1022 (La.), *reh'g denied*, 820 So. 2d 565 (2002) (denying application of nonpermanent visaholder) *with In re Application of Appert*, 444 So. 2d 1208, 1208 (La. 1984) and *In re Application of Respondek*, 442 So. 2d 435, 435 (La. 1983) (approving applications of nonpermanent visaholders).[1]

Petitioners Caroline Wallace and Emily Maw are citizens of the United Kingdom who reside lawfully in

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[1] "Resident alien" is not a defined term in the Immigration and Naturalization Act, 8 U.S.C. § 1101 *et seq.* The Act does define "immigrant" and "nonimmigrant" aliens. 8 U.S.C. § 1101(a)(15). Immigrant aliens are aliens granted permanent residence in the United States. *Id.* Nonimmigrant aliens are aliens granted temporary residence in the United States for specific purposes. *Id.* An "alien" is "any person not a citizen or national of the United States," *Id.* § 1101(a)(3), and "residence" means "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." *Id.* § 1101(a)(33). As Judge Stewart observed below, "the term 'resident alien' is broader than the [Immigration] Act's immigration categories and includes both immigrant and nonimmigrant aliens lawfully residing in the United States." App. 38a-39a.

Louisiana under nonpermanent visas. Wallace holds an H-1B visa and works as a paralegal for the Capital Post Conviction Project of Louisiana. She has a law degree from Cambridge University, and is licensed to practice law in England and Wales. After the district court decision in her case, Wallace sat for and passed the Louisiana State Bar Examination, but has not been admitted, and will not be admitted unless the decision below is reversed.

Maw initially came to the United States under a student (F-1) visa to attend law school at Tulane University. Maw also holds an LLB from the University of Edinburgh. She received her J.D. from Tulane in 2003 and now resides lawfully in New Orleans under an H-1B visa. Maw is a member of the bar of the State of Mississippi; she is the director of Innocence Project New Orleans and represents indigent criminal defendants in Mississippi.

Both Wallace and Maw applied for admission to the Louisiana State Bar, with the goal of representing indigent criminal defendants, including capital case defendants, in Louisiana. The Bar denied their applications because they are not "resident aliens" under the Supreme Court of Louisiana's new interpretation of Rule 3(B). Wallace and Maw brought suit under 42 U.S.C. § 1983 against the members of the Louisiana Supreme Court and the executives of the Louisiana Committee on Bar Admissions alleging, *inter alia*, that Rule 3(B) violates the Equal Protection and Supremacy Clauses of the United States Constitution. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court granted Wallace and Maw's motion for summary judgment on September 17, 2003, holding that Respondents' enforcement of Rule 3(B) to bar Petitioners' applications to the Louisiana Bar violated the Equal Protection Clause of the Fourteenth Amendment. App. 61a-72a. The District Court held that this Court's

decision in *In re Griffiths*, 413 US 717 (1973) required application of strict scrutiny review to Rule 3(B) because the Rule discriminated against aliens on the basis of their status as aliens. *Id.* at 67a-70a. In doing so, the District Court differed from the *Leclerc* trial court, which applied rational basis review and found Rule 3(B) to be constitutional. *See* 270 F. Supp. 2d at 800-01. Timely appeals in each case followed; the Fifth Circuit consolidated the cases for briefing and argument.

On July 29, 2005, a panel of the Fifth Circuit issued its decision in favor of Respondents. *See* App. 1a-35a. Judge Stewart dissented on the grounds that (1) decisions of this Court require application of strict scrutiny to challenges involving state actions that discriminate on the basis of alien status; and (2) that even if strict scrutiny did not apply, Rule 3(B) is still invalid because it is not rationally related to any legitimate state interest. *Id.* at 33a-43a.

Petitioners filed a timely petition for rehearing en banc on August 12, 2005. The Fifth Circuit denied the petition on March 27, 2006, over seven dissenting votes. Writing for seven members of the Court, Judge Higginbotham explained that the panel majority reached "its result by judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship. This is a bold step not sanctioned by Supreme Court precedent." App. 75a. Judge Higginbotham observed that:

> As the federal judiciary draws distinctions between different classes of aliens, applying strict scrutiny to some and rational-basis review to others, it shifts responsibility over aliens from Congress to the States. This is perverse. The panel majority relaxes scrutiny of state regulation of aliens as the federal regulation of them is increased. This is too ambitious for me.

Id. at 77a. Judge Stewart penned a separate dissenting opinion, in which he expressed concern about the "far reaching consequences of the panel's holding." *Id.* at 78a.

REASONS FOR GRANTING THE WRIT

This case arises in the context of bar admission rules, but the legal principles at issue apply to any state classifications that discriminate against lawfully-admitted nonpermanent visaholding aliens. Accordingly, the questions of (i) what standard of review should apply to equal protection analysis in such circumstances and (ii) to what extent may state classifications conflict with the federal immigration laws are of great significance. The Court should grant a writ of certiorari to resolve the conflict between the Fifth Circuit's decision below and prior decisions of this Court regarding the appropriate standard of review to apply to state classifications that discriminate against aliens—either as a class or against subclassifications of aliens. The decision below is also in direct conflict on this issue with a decision of the Fourth Circuit. The Court should also grant a writ of certiorari to resolve the conflict between the Fifth Circuit and a state court of last resort—the Supreme Court of Vermont—regarding the preemptive effect of federal immigration laws on state laws that prohibit visa-holding resident aliens from attaining state licenses to practice professions.

I. The Decision Below Conflicts with this Court's Holdings and a Holding of the Fourth Circuit Regarding the Equal Protection Clause.

"Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Griffiths*, 413 U.S. at 721 (quoting *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971)). This Court repeatedly has held that state laws which discriminate solely against subclassifications of

lawfully-admitted aliens also must meet strict scrutiny review.[2] *See Graham*, 403 U.S. at 371-72 (applying strict scrutiny review in equal protection challenge to state law that affected only aliens who had not resided in the state for a certain period of time); *Nyquist v. Mauclet*, 432 U.S. 1, 8-9 (1977) (applying strict scrutiny to invalidate state law that prevented certain aliens from applying for state financial assistance for higher education).

Griffiths concerned an equal protection challenge to a Connecticut bar rule that prevented aliens from practicing law. The decision in *Griffiths* invalidating Connecticut's rule should have controlled here. The panel majority, however, sought to distinguish *Griffiths* on the ground that the plaintiff in *Griffiths* was a "permanent resident alien," even though the "permanent" qualifier does not appear anywhere in the *Griffiths* decision. App. 13a. Moreover, as Judge Stewart explained in dissent, this Court repeatedly has used the term "resident alien" to indicate simply "that the alien resides in the United States." *Id.* at 36a. As one commentator observed in analyzing the Fifth Circuit's decision, "The rationale settled upon–that nonimmigrants are transients who bear fewer social burdens than permanent residents–requires creative, counterintuitive interpretation of equal protection jurisprudence. Not only has the Supreme Court never differentiated equal protection review based on status as an immigrant or a nonimmigrant alien, but the governing cases also appear to downplay the relevance of aliens' transience." Case Comment, *Constitutional Law - Equal Protection - Fifth Circuit Holds that Louisiana Can Prevent Nonimmigrant Aliens from Sitting for the Bar*, 119 Harv. L. Rev. 669, 673 (2005) (hereinafter, "*Harvard Law Review* Comment").

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[2] The Court has not applied strict scrutiny review to illegal aliens. *See Plyler v. Doe*, 457 U.S. 202 (1982).

There is nothing in the *Griffiths* decision that suggests that the plaintiff's "permanent" status, as opposed to her alien status, had any relevance to the Court's decision invalidating Connecticut's rule that prevented aliens from becoming members of the bar. The plaintiff in *Griffiths* had not renounced her Dutch citizenship and had the same right to leave the United States at any time and return to her home country; as do petitioners here. *See* 413 U.S. at 718 n.1. "Evidently, the *Griffiths* Court believed that resident aliens could simultaneously express the desire to retain foreign citizenship and have a highly protected right to serve as an American attorney. This precedent cuts strongly against the [Fifth Circuit]'s reasoning." *Harvard Law Review* Comment, *supra* text, at 674.

The panel majority also sought to distinguish *Griffiths* on the basis of the following *obiter dictum* from the Court's decision: "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722. But, as Judge Stewart pointed out in his dissent below, it is highly doubtful that the Court intended these factors to be preconditions for strict scrutiny—for example, there was no indication that Ms. Griffiths had ever served in the armed forces, or that she was even physically able or young enough to do so.[3] "Instead, the basis for aliens' class designation seems to be premised on aliens' inability to vote, and thus their impotence in the political process, and the long history of invidious

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[3] As Judge Stewart explained, under the Tax Code and IRS regulations, petitioners Wallace and Maw pay taxes as "resident aliens" in the same manner as do green card holders. App. 36a & n.57.

discrimination against them." App. 38a. This is the very point this Court made in *Graham*: aliens are "a prime example of a 'discrete and insular' minority ... for whom such heightened judicial solicitude is appropriate." 403 U.S. at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)).[4]

The panel majority also sought to distinguish *Griffiths* on the ground that the state law at issue there was a "wholesale ban" of aliens from the Connecticut Bar. App. 13a. This approach ignores this Court's holdings in *Graham* and *Nyquist*, which firmly establish that strict scrutiny is applicable when, as here, there is a "wholesale ban" that applies only to certain subclassifications of aliens. The Court's explicit rejection of an identical

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[4] The panel majority's assertion that Wallace and Maw are not part of a "discrete and insular minority," App. 17a, is off the mark for several reasons. *First*, since aliens as a whole are a "discrete and insular" minority due to their inability to participate in the political process, then subcategories of visa-holders like Wallace and Maw are at least as "discrete and insular" if not more so. *See Harvard Law Review* Comment, *supra* text, at 674 ("The alien class is suspect because of its political impotence, which is universal; subdivisions within this class do not alter the group's discrete and insular nature."). *Second*, the panel incorrectly stated that these lawful resident aliens are situated in a manner materially different from other aliens with respect to their "economic, social, and civic ... conditions." App. 18a. For instance, as Judge Stewart noted, "resident aliens" like Wallace and Maw pay taxes just like U.S. residents. App. at 36a & n.57 (citing 26 U.S.C. § 7701(b)). And, as Judge Stewart also pointed out, H-1B visa-holders like Wallace and Maw need not pledge a temporary stay in the United States to gain admission; they can have "dual intent" and seek permanent residence here. *See id.* at 39a (citing 22 C.F.R. § 41.11 (2006); 8 C.F.R. § 214.2(h)(16) (2006)).

argument in *Nyquist* requires rejection of the panel majority's rationale:

> Appellants claim that [the State law] should not be subjected to such strict scrutiny because it does not impose a classification based on alienage. Aliens who have applied for citizenship, or, if not qualified for it, who have filed a statement of intent to apply as soon as they are eligible, are allowed to participate in the assistance programs. Hence, it is said, the statute distinguishes "only within the 'heterogeneous' class of aliens" and "does not distinguish between citizens and aliens vel non." Only statutory classifications of the latter type, appellants assert, warrant strict scrutiny. ...
>
> *Graham v. Richardson* ... undermines appellants' position. In that case, the Court considered an Arizona statute that imposed a durational residency requirement for welfare benefits on aliens but not on citizens. Like the New York statute challenged here, the Arizona statute served to discriminate only within the class of aliens .... The Court nonetheless subjected the statute to strict scrutiny and held it unconstitutional. *The important points are that [the State law] is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.*

Nyquist, 432 U.S. at 8-9 (footnotes and citations omitted) (emphasis added).[5]

The panel majority decision also is in direct conflict with the Fourth Circuit's holding in *Moreno v. University of Maryland*, 645 F.2d 217 (1981), *aff'd sub nom., Toll v. Moreno*, 458 U.S. 1 (1982).[6] In *Moreno*, the district court, in a thorough opinion, relied upon *Griffiths*, *Graham*, *Nyquist*, and other holdings of this Court to determine that strict scrutiny applied to a state classification that precluded "nonimmigrant aliens"–that is, aliens residing in the United States under nonpermanent G-4 visas–from consideration for in-state tuition, and on this basis found that the classification at issue violated the Equal Protection Clause. *See Moreno v. Toll*, 489 F. Supp. 658, 660-67 (D. Md. 1980). The Fourth Circuit affirmed and adopted the district court's reasoning, stating that "we agree that the [classification at issue] is invalid under the Constitution." 645 F.2d at 220.

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[5] The panel majority also attempted to draw support for discriminatory treatment from *Matthews v. Diaz*, 426 U.S. 67, 83 (1976), a case involving eligibility for federal welfare benefits. *See* App. 18a-19a n.35. This case, too, is inapposite: as Judge Stewart explained, App. 34a, *Matthews* concerned the *federal* government's ability to draw distinctions based on alienage stemming from Congress' plenary power to regulate immigration, and has no application to a *State's* discriminatory practices.

[6] This Court affirmed *Toll* on Supremacy Clause grounds and thus had "no occasion to consider whether the policy violates the ... Equal Protection Clause." 458 U.S. at 10. The Fourth Circuit's alternate Equal Protection holding remains the law of that Circuit. In this case, the panel majority erroneously implied that the Court's failure to address the Equal Protection arguments in *Toll* created an ambiguity about the appropriate standard of review to apply. *See* App. 15a & n.26.

As both Judge Stewart and Judge Higginbotham pointed out in dissent, the panel majority could not explain how or why its approach should vary from this Court's binding precedent in *Griffiths*, *Nyquist*, and *Graham*. *See* App. 34a-42a (Judge Stewart), 75a-77a (Judge Higginbotham). Respondents conceded below that Rule 3(B) will not survive if strict scrutiny is applied. In fact, Rule 3(B) cannot survive under *any* form of heightened scrutiny because it is wholly over- and under-inclusive to remedy any problems caused by the "transiency" of members of the Lousiana Bar. This Court should grant certiorari in order to resolve this important issue and to forestall the "far reaching consequences" of the decision below. App. 78a.[7] Even the panel majority conceded, App. 12a, that there was "some ambiguity in Supreme Court precedent" regarding the appropriate level of scrutiny to apply, thereby implicitly recognizing that its application of rational basis review was not sanctioned by prior precedent.

II. The Decision Below Conflicts with the Decision of a State Court of Last Resort Regarding Preemption.

Congress has established a comprehensive statutory scheme to govern the treatment of aliens and immigrants in the United States. *See* 8 U.S.C. §§ 1101 *et seq.* Petitioners argued below that the challenged rule is inconsistent with these statutory provisions and that it thus violates the Supremacy Clause. U.S. Const. art. VI.

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[7] At the very least, the Rule should be subject to some degree of heightened scrutiny, such as that employed in *City of Cleburne v. Cleburne Living Center*, 473 U.S. [illegible] (1985) or *Plyler v. Doe*, 457 U.S. 202 (1982). *See Harvard Law Review* Comment, *supra* text, at 674-75; *see also Leclerc v. Webb*, 270 F. Supp. 2d 748, 779 (E.D. La. 2003).

The Fifth Circuit rejected this argument. App. 31a-35a. Its decision is in direct conflict with a decision of the Supreme Court of Vermont, which invalidated under the Supremacy Clause a bar admission rule that discriminated against aliens holding H-1B visas, as are held by Petitioners here. *See Dingemans v. Board of Bar Examiners*, 568 A.2d 354, 356 (Vt. 1989).

The Supremacy Clause prevents states from enacting regulations that place burdens on resident aliens that are not authorized nor contemplated by Congress. *See Toll v. Moreno*, 458 U.S. 1, 17 (1982) (invalidating state policy of prohibiting certain nonpermanent visaholders from obtaining in-state tuition rates); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948) (striking down state law prohibiting a certain class of aliens from obtaining commercial fishing licenses); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases, they cannot live where they cannot work."). Enforcement of the challenged rule not only places an additional burden on aliens that is not contemplated by Congress, it also conflicts directly with federal immigration law.

Federal law makes clear than an H-1B visa holder is admitted to the United States for the purpose of engaging in a "specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). Federal law also makes clear that a *lawyer* qualifies as one engaged in a "specialty occupation." *See* 8 C.F.R. § 214.2(h)(4)(ii) (2004) (term "specialty occupation" includes "law"); *see also* 8 U.S.C. § 1101(a)(32) (term "profession," from which definition of "specialty occupation" was derived, includes "lawyers"). Plainly, federal law contemplates that aliens may enter the United States under H-1B visas to work as lawyers.

Federal law also requires that an alien obtain "full state licensure to practice the occupation, if such licensure is required to practice in the occupation." 8 U.S.C. § 1184(i)(2)(A). In other words, "[i]f an occupation requires a state or local license for an individual to fully perform the duties of the occupation"—as the occupation of lawyer clearly does—an alien "*must have that license* prior to approval" of the H-1B visa. 8 C.F.R. § 214.2(h)(4)(v) (2004) (emphasis added). If federal policy requires an alien to "have" state licensure before qualifying for H-1B status as a lawyer, it necessarily contemplates that a prospective H-1B lawyer may at least *seek* state licensure in the first place. Louisiana's rule denies non-permanent alien lawyers that opportunity.

The conflict between federal immigration policy and Louisiana's bar admission rule is clear. On the one hand, federal law clearly contemplates that aliens may come to the United States to work as lawyers. On the other hand, by categorically excluding H-1B visa holders from bar membership, Louisiana's rule effectively precludes any alien from ever obtaining an H-1B visa to practice law in Louisiana. If Louisiana's rule were adopted by the rest of the States, federal law would provide for visas that could never issue. Because Rule 3(B) "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), it cannot stand under the Supremacy Clause. *See Dingemans*, 568 A.2d at 356.

The Fifth Circuit concluded that there was no conflict because the H-1B licensure requirements are "permissive" and not "mandatory." App. 31a-32a. In other words, the Fifth Circuit found that there was no preemption because nonpermanent visaholding aliens seeking to work in the legal profession in Louisiana could do so in an unlicensed capacity (*e.g.*, as a paralegal). This erroneous application of preemption analysis conflicts

with this Court's decision in *Toll v. Moreno*, 458 U.S. 1 (1982).

Toll involved a statute which, like the rule at issue here, expressly discriminated against *nonpermanent* resident aliens. At issue in *Toll* was a Maryland policy that granted in-state tuition benefits to citizens and permanent resident aliens living in Maryland but denied those benefits to non-permanent resident aliens living in the State (including, as relevant there, G-4 visaholders whose parents worked at the World Bank). The Court emphasized that its prior cases took "pains to note the substantial limitations upon the authority of the States in making classifications based on alienage." *Id.* at 10.

The *Toll* Court relied upon *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), where the Court invalidated a California law that barred aliens who were ineligible for citizenship "from obtaining commercial fishing licenses, even though they 'met all other state requirements' and were lawful inhabitants of the State." *Toll*, 458 U.S. at 10 (quoting *Takahashi*, 334 U.S. at 414). The *Toll* Court also relied on *Graham v. Richardson*, which had held that state laws withholding welfare benefits from some (but not all) resident aliens both violated the Equal Protection Clause and were preempted by federal immigration law. The Court reasoned that by denying aliens welfare benefits the States had "imposed an 'auxiliary burde[n] upon the entrance or residence of aliens' that was never contemplated by Congress." *Toll*, 458 U.S. at 12 (quoting *Graham*, 403 U.S. at 379).

Summarizing, the Court in *Toll* observed that "[r]ead together, *Takahashi* and *Graham* stand for the broad principle that 'state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress.'" 458 U.S. at 12-13 (quoting *De Canas v. Bica*, 424 U.S. 351, 358 (1976)). The Court in *Toll* found that such an

impermissible burden existed in the case before it by employing the following reasoning: By virtue of federal treaties and statutes, the G-4 visa holders before it were "relieved of federal and, in many cases, state and local taxes" on their visa-related (*e.g.*, World Bank) income. *Toll*, 458 U.S. at 14. The federal government's purpose in granting G-4 visa holders such tax exemptions was "to benefit the employing international organizations by enabling them to pay salaries not encumbered by the full panoply of taxes," thereby "lowering the organizations' costs" and thus providing an "inducement for these organizations to locate significant operations in the United States." *Id.* at 16.

By imposing higher tuition costs on G-4 aliens, the Maryland policy at issue negated the aliens' tax advantages, which *in turn* could cause organizations like the World Bank to have to pay higher employee salaries, which *in turn* could increase those organizations' costs, which *in turn* could reduce their incentives to locate operations in the Unites States and thus "frustrate[] ... federal policies." *Id.* The frustration of congressional policy here is much starker and more direct than in *Toll*. Federal immigration laws provide that nonpermanent visaholding aliens may be admitted to the United States to work as lawyers. Yet, Rule 3(B) prohibits these same aliens from practicing law in Louisiana. As the Supreme Court of Vermont properly held in striking an identical discriminatory classification, "[t]he rule thus imposes a burden on the federal immigration program that could not have been intended by the Congress." *Dingemans*, 568 A.2d at 357 (citation omitted). The Court should grant a writ of certiorari to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 23, 2006

Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,

Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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FIFTH CIRCUIT OPINION

REVISED AUGUST 18, 2005

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30752

KAREN LECLERC; GUILLAUME JARRY;
BEATRICE BOULORD; MAUREEN D. AFFLECK,

Plaintiffs - Appellants - Cross Appellees,

versus

DANIEL E. WEBB, ET AL.,

Defendants,

DANIEL E. WEBB; HARRY J. PHILLIPS, In Their Respective Official Capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions; JEFFERY P. VICTORY; JEANNETTE THERIOT KNOLL; CHET D. TRAYLOR; CATHERINE D. KIMBALL, a/k/a Kitty Kimball; JOHN L. WEIMER; BERNETTE JOSHUA JOHNSON, In Their Official Capacities as Justices of the Louisiana Supreme Court,

Defendants - Appellees - Cross Appellants.

****

No. 03-31009

CAROLINE WALLACE; EMILY MAW,

Plaintiffs - Appellees,

versus

PASCAL F. CALOGERO JR., in his official capacity as Chief Justice of the Louisiana Supreme Court; JEFFREY P. VICTORY; JEANNETTE THERIOT KNOLL; CHET D. TRAYLOR; CATHERINE D. KIMBALL; JOHN L. WEIMER; BERNETTE J. JOHNSON, in their official capacities as Justices of the Louisiana Supreme Court; DANIEL E. WEBB; HARRY J. PHILLIPS, JR., in their respective official capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions,

Defendants - Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana,

---

Before JONES, SMITH, and STEWART, Circuit Judges.
EDITH H. JONES, Circuit Judge:

This appeal arises from two consolidated actions filed by nonimmigrant aliens whose status, according to Louisiana Supreme Court Rule XVII, § 3(B), renders them ineligible to sit for the Louisiana Bar.[1] The district courts disagreed whether the Louisiana rule impermissibly

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[1] LeClerc, et al. v. Webb, et al., 270 F. Supp. 2d 779 (E.D. La. 2003), and Wallace, et al. v. Calogero, et al., 286 F. Supp. 2d 748 (E.D. La. 2003). We consolidated these cases for purposes of this appeal.

discriminates against the plaintiffs in violation of the Equal Protection Clause. Because the level of constitutional protection afforded nonimmigrant aliens is different from that possessed by permanent resident aliens, we hold that the Louisiana rule survives rational basis review.

BACKGROUND

I. Louisiana Bar Rule

Louisiana Supreme Court Rule XVII, § 3(B) ("Section3(B)") requires that "[e]very applicant for admission to the Bar of this state shall . . . [b]e a citizen of the United States or a resident alien thereof." Prior to the adoption of Section 3(B), Louisiana precedent defined "resident alien" as a "foreign national[] lawfully within the United States." In re Appert, 444 So. 2d 1208, 1208 (La. 1984). In 2002, the Louisiana Supreme Court overturned Appert, and held that the term "resident alien . . . appl[ies] only to those aliens who have attained permanent resident status in the United States." In re Bourke, 819 So. 2d 1020, 1022 (La. 2002). As interpreted in Bourke, Section 3(B) effectively prohibits the instant plaintiffs — nonimmigrant aliens[2] who are "not entitled to live and work in the United States permanently" — from sitting for the Louisiana Bar. Bourke, 819 So. 2d at 1022.

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[2] The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens, negatively defining an immigrant alien as "every alien except an alien who is within one of the following classes of nonimmigrant aliens." 8 U.S.C. § 1101(a)(15) [IMMLS PSD INA § 101]. An alien falling into one of fifteen exclusionary categories is a nonimmigrant alien, a class generally delimited by a lack of intention to abandon his foreign country residence and entry into the United States for specific and temporary purposes.

II. The LeClerc Plaintiffs

The LeClerc plaintiffs, Karen LeClerc, Guillame Jarry, Beatrice Boulord, and Maureen Affleck, are nonimmigrant aliens who hold degrees from foreign law schools and seek leave to sit for the Louisiana Bar. LeClerc and Jarry are French citizens admitted to the United States on J-1 student visas.[3] Boulourd, also a French citizen, was initially admitted to the United States on a J-1 student visa, but currently remains in the United States on an H-1B temporary worker visa.[4] Affleck is a Canadian citizen initially admitted to the United

---

[3] Title 8 U.S.C. § 1101(a)(15)(J) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> having a residence in a foreign country which he has no intention of abandoning who is a bona fide student . . . is coming temporarily to the United States as a participant in a program . . . for the purpose of . . . studying . . . .

[4] Title 8 U.S.C. § 1101(a)(15)(H)(i)(b) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> is coming temporarily to the United States to perform services . . . in a specialty occupation. . . . having residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States as a trainee . . . in a training program that is not designed primarily to provide productive employment . . . .

Pursuant to the 1990 Act, an H-1B visa holder is no longer required to maintain "a temporary residence abroad which he or she has no intention of abandoning." Steel on Immigration, §3:13, 3-35. Nor is such a visa holder subject to the presumption of immigrant status. 8 U.S.C. § 1184(b). However, the nature of an H-1B visa holder's status in the United States is still temporary, the visa holder is still subject to a six-year admission cap (three years admission plus three years extension) notwithstanding, inter alia, a change in status. Steel, at 3:13, 3-73-74.

States on an L-2 spousal visa, but currently remains in the United States on an H-1B temporary worker visa.[5]

As graduates of foreign law schools seeking permission to sit for the Louisiana Bar, each plaintiff was required to apply for an equivalency determination pursuant to Louisiana Supreme Court Rule XVII, § 6 ("Section 6").[6] Before the commencement of the LeClerc suit, Affleck applied for, and was denied an equivalency determination because her status did not comply with Section 3(B). The other plaintiffs filed for equivalency determinations after the suit commenced and were similarly refused. None of the plaintiffs appealed their equivalency denials as permitted by Louisiana Supreme Court Rule XVII, § 9 ("Section 9").[7]

On March 6, 2003, the plaintiffs filed suit, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1367, against the Louisiana Supreme Court[8] and the Chairman[9]

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[5] Title 8 U.S.C. § 1101(a)(15)(L) [IMMLS PSD INA § 101], derivatively admits a nonimmigrant "alien spouse and minor child[] of [an L-1] alien."

[6] LR XVII, § 6 provides that:

"An applicant who has graduated from a law school that is not located in the United States or its territories must submit an application for the Committee for an equivalency determination . . . ."

[7] LR XVII, § 9 provides that:

Upon notice . . . that applicant has failed to fulfill one or more of the requirements of . . . Section 6, . . . , the applicant may appeal by petition directly to the Court.

[8] Pascal F. Calogero, Jr., Jeffrey P. Victory, Jeanette T. Knoll, Chet D. Traylor, Catherine D. Kimball, John L. Weimer, and Bernette J. Johnson. The LeClerc plaintiffs did not name the Honorable Pascal F. Calogero, Jr., the lone dissenter in Bourke.

[9] Daniel A. Webb.

and Vice-Chairman[10] of the Louisiana Committee on Bar Admissions (collectively "defendants") in their official capacities. The plaintiffs challenged the enforcement of Section 3(B) and sought declaratory and injunctive relief and attorneys' fees. They requested expedited discovery related to the adoption of Section 3(B), including records of the Louisiana Supreme Court's official meetings, processes, and opinions. The defendants moved to quash the plaintiffs' discovery requests, asserting judicial and legislative immunity. Finding the defendants judicially immune, a magistrate judge granted the motion. On April 17, 2003, the plaintiffs moved for summary judgment, and the defendants countered with a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim based, inter alia, on standing, ripeness, Eleventh Amendment, judicial and legislative immunity, and abstention grounds.

The district court partially granted the defendants' motion to dismiss, denied the plaintiffs' motion for summary judgment, and denied as moot the plaintiffs' appeal of the magistrate judge's discovery ruling.[11] While rejecting the defendants' jurisdictional arguments, the court held on the merits that: (1) Section 3(B) is not preempted by federal immigration or trade policy; (2) Affleck lacked standing to assert a claim under the NAFTA;[12] (3) the plaintiffs failed to state a claim for

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[10] Harry J. Phillips.

[11] The LeClerc plaintiffs appeal the discovery ruling, which this Court reviews for abuse of discretion. In re Grand Jury Proceedings, 115 F.3d 1240, 1243 (5th Cir. 1997). Because the plaintiffs' discovery requests border on the absurd, we find no such abuse.

[12] We affirm this ruling. As conceded in oral argument, Affleck, although a Canadian citizen, is not a beneficiary of NAFTA. Moreover, NAFTA limits enforcement to the Secretary of State and the United States Attorney General. Thus, even if a beneficiary of the treaty, Affleck has no private right of action thereunder.

violation of either procedural or substantive Due Process; and (4) applying rational basis review, Section 3(B) is rationally related to legitimate state interests, and, thus, constitutional. The district court denied plaintiffs' motion to reconsider on July 30, 2003.[13] Both parties timely noticed their appeals and cross-appeals.

III. The Wallace Plaintiffs

The Wallace plaintiffs' suit landed before a different federal district judge in New Orleans. Caroline Wallace and Emily Maw are nonimmigrant aliens who seek leave to sit for the Louisiana bar exam. Both are citizens of the United Kingdom who were admitted to the United States on temporary visas. Wallace holds an H-1B temporary worker visa and is licensed as an attorney in England and Wales. Wallace is currently employed doing nonattorney legal work. Maw was admitted to the United States pursuant to an F-1 student visa[14] and remains on

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[13] The plaintiffs appeal this ruling. We **AFFIRM**. We review a district court's denial of a motion for reconsideration for abuse of discretion. Westbrook v. C.I.R., 68 F.3d 868, 879 (5th Cir. 1995). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." Templet v. HydroChem Inc., 367 F.3d 473, 479 (5th Cir. 2004). A motion for reconsideration may not be used to rehash rejected arguments or introduce new arguments. Westbrook, 68 F.3d at 879. In their motion, not only did the plaintiffs improperly re-argue the merits of their case, they also impermissibly asserted, for the first time, arguments under the General Agreement on Trade and Services ("GATS"), the Dormant Commerce Clause, and the right to travel. As such, we find no abuse of discretion in the court's denial on the basis of these errors. Moreover, having been improperly raised below, we will not consider on appeal the GATS, Dormant Commerce Clause, or right to travel arguments advanced by the plaintiffs.

[14] Title 8 U.S.C. § 1101(a)(15)(F) [IMMLS PSD INA § 101], admits a nonimmigrant alien who:

> ha[s] a residence in a foreign country which he has no intention of abandoning, is a bona fide student qualified to pursue a full course of study and [] seeks to enter the United

(...continued)

an H-1B temporary worker visa.[15] Maw holds a law degree from Tulane University Law School in New Orleans and is currently employed as a paralegal.

Before filing suit, Wallace applied for an equivalency determination, and avers that after she was initially granted permission to sit for the Bar, permission was revoked for her noncompliance with Section 3(B). Although the record is unclear, Maw either applied to sit for the Bar exam or moved for admission by reciprocity. Either way, the defendants denied her application for lack of Section 3(B) qualification.[16] Neither plaintiff appealed her denial to the Louisiana Supreme Court pursuant to Rule 9.

On May 2, 2003, the plaintiffs filed a suit against the defendants, which is parallel in all relevant respects to the LeClerc action. However, their motion to consolidate their action with the LeClerc suit was inexplicably denied. Cross-motions for judgment followed as in LeClerc, but with different results.

The Wallace district court denied the defendants' motion to dismiss and partially denied the plaintiffs' motion for summary judgment. Like the LeClerc court, the Wallace court rejected the defendants' jurisdictional arguments. The court dismissed the plaintiffs' preemption claim, but denied their Due Process claim as moot. On the plaintiffs' Equal Protection claim, however, the court applied strict scrutiny review and held that because

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States temporarily and solely for the purpose of pursuing such a course of study . . . .

[15] At oral argument, counsel represented that Maw is now an H-1B visa holder.

[16] Sometime after this suit commended, Maw took and passed the Louisiana Bar exam. Her admission to the Bar is stayed pending the outcome of this case.

Section 3(B) is not the least restrictive means to achieve the state's asserted compelling interests, it is unconstitutional. Defendants timely noticed their appeal.

The two cases are consolidated on appeal in this court. Because the issues raised are nearly identical, any references to plaintiffs in the following discussion include, unless otherwise noted, the LeClerc and Wallace plaintiffs.

STANDARD OF REVIEW

We review de novo a district court's Rule 12(b)(1) (motion to dismiss for lack of subject matter jurisdiction), Rule 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted), and Rule 56 (motion for summary judgment) dispositions, applying the same standards as the district court. Bombardier Aerospace v. Ferrer, Poirot & Wansbrough, P.C., 354 F.3d 348, 352 (5th Cir. 2003).

DISCUSSION

A. Federal Jurisdiction

The defendants maintain that the plaintiffs lack standing and present unripe claims. They further assert judicial and legislative immunity from the LeClerc and Wallace suits pursuant to precedent and the Federal Courts Improvement Act of 1996 ("FCIA"), 42 U.S.C. § 1983.[17]

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[17] Because federal jurisdiction cannot be waived or assumed, Rohm & Hass Texas, Inc. v. Ortiz Bros. Insulation, Inc., 32 F.3d 205, 207 (5th Cir. 1994), we address the defendants' jurisdictional arguments briefly even though they appeared to abandon these jurisdictional contentions at oral argument. See United Transp. Union v. Foster, 205 F.3d 851, 857 (5th Cir. 2000) (discussing the Court's obligation to independently examine its jurisdiction despite party concessions).

Standing and ripeness are two doctrines of justiciability that assure federal courts will only decide Article III cases or controversies. To achieve standing, a plaintiff must have suffered an injury in fact, see Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2308, 159 L.Ed.2d 98 (2004), and generally, "must submit to the challenged policy" before pursuing an action to dispute it. Ellison v. Connor, 153 F.3d 247, 254-55 (5th Cir. 1998). However, strict adherence to the standing doctrine may be excused when a policy's flat prohibition would render submission futile. Ellison, 153 F.3d at 255 (citing Moore v. United States Dept. of Agric., 993 F.2d 1222 (5th Cir. 1993)). The ripeness doctrine counsels against "premature" adjudication by distinguishing matters that are "hypothetical" or "speculative" from those that are poised for judicial review. United Trans. Union, 205 F.3d at 857. Even actions for declaratory relief, which by design permit pre-enforcement review, require the presence of an actual "case" or "controversy." Id. A pre-enforcement action "is generally ripe if any remaining questions are purely legal . . . [and] further factual development" is not required for effective judicial review. Id.

Both the futility exception to the standing doctrine and the pre-enforcement variance to the ripeness doctrine apply here. Strict compliance with the standing doctrine would have required each plaintiff (except Maw) to apply for an equivalency determination under Section 6 of the Louisiana Bar Rules before filing suit. Strict compliance with the ripeness doctrine would have required each plaintiff to file a Section 9 appeal of his or her equivalency denial or rejection prior to filing suit. All but two plaintiffs, Affleck and Wallace, failed to comply with Section 6, and none complied with Section 9.

Nevertheless, given Affleck's equivalency denial after her timely application, Wallace's equivalency revocation, and Section 3(B)'s prohibition against the

admission of nonimmigrant aliens, as interpreted in Bourke, there is no reason to believe that the plaintiffs who failed to submit to Section 3(B) by filing timely Section 6 applications would have experienced different outcomes. The non-conforming plaintiffs' submission would have been a futility for standing purposes.[18] Likewise, the plaintiffs' failure to avail themselves of Section 9 is excused because the aforementioned facts undermine the utility of further factual development, leaving only pure legal questions for adjudication. The plaintiffs thus have standing and have asserted claims that are ripe for adjudication.

Next, rejecting the defendants' immunity defenses, we find that they are amenable to the instant suits. When acting in its enforcement capacity, the Louisiana Supreme Court, and its members, are not immune from suits for declaratory or injunctive relief. See Supreme Court of Virginia v. Consumers Union of the U.S., 446 U.S. 719, 100 S. Ct. 1967 (1980) (holding that the Virginia Supreme Court and its chief justice may be sued for acts committed in their enforcement capacities). Moreover, the FCIA of 1996 only precludes injunctive relief for suits against a judicial defendant acting in his "judicial capacity."[19] Thus, to the extent that the plaintiffs seek declaratory and injunctive relief against the enforcement of Section 3(B)

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[18] Although Maw's current status — having been permitted to take the Louisiana Bar — complicates this issue, the totality of the plaintiffs' experiences weigh in favor of a futility finding.

[19] Title 42 U.S.C. § 1983 provides that:

> [I]n any action brought against a judicial officer for an act or omission taken in such officer's **judicial capacity**, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

(emphasis added) (amended Oct. 19, 1996 by PUB. L. 104-317, TITLE III. § 309(c), 110 STAT. 3853).

only, the court and its individual members are subject to the instant suits.

B. Merits

Plaintiffs contend that Section 3(B) violates their rights under the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment,[20] and the Supremacy Clause of Art. VI, cl. 2. Each contention will be discussed in turn.

1. Equal Protection

The plaintiffs first advance arguments based on every conceivable level of Equal Protection analysis, contending that: (1) under In re Griffiths,[21] nonimmigrant aliens are a suspect class and state laws affecting them are subject to strict scrutiny; (2) in the alternative, nonimmigrant aliens are a quasi-suspect class and state laws affecting them are subject to intermediate scrutiny; and (3) in the alternative, if nonimmigrant aliens are not a suspect class at all, state laws affecting them are subject to rational basis review. Plaintiffs maintain that Section 3(B) fails under any of the three tests. Despite some ambiguity in Supreme Court precedent, we conclude that because Section 3(B) affects only nonimmigrant aliens, it is subject to rational basis review.

To begin, nonimmigrant aliens are not a suspect class under Griffiths. The plaintiff in Griffiths was a permanent resident alien, who, but for a Connecticut law that conditioned bar admission on United States citizenship, would have been eligible to sit for the

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[20] Only the LeClerc plaintiffs assert a Due Process violation on appeal.

[21] 413 U.S. 717, 93 S. Ct. 2851 (1973).

Connecticut bar exam. 413 U.S. at 718, 93 S. Ct. at 2853. The instant plaintiffs, however, are nonimmigrant aliens. The distinction, far from being a "constitutional irrelevancy,"[22] is paramount.[23] Section 3(B) only affects nonimmigrant aliens who are "not entitled to live and work in the United States permanently." Bourke, 819 So. 2d at 1022. In contrast, the rule at issue in Griffiths effected a "total exclusion [of all] aliens from the practice of law" in Connecticut. Griffiths, 413 U.S. at 719, 93 S. Ct. at 2853. It was this "wholesale ban" of aliens from the Connecticut Bar that the Supreme Court found constitutionally infirm. Id. at 725, 93 S. Ct. at 2856. Moreover, as elaborated below, the Court took pains to categorize the ways in which resident aliens share essential benefits and burdens of citizenship, see id. at 722, 93 S. Ct. at 2855, in a way that aliens with lesser legal status do not.

Thus far, the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens. As the highest level of Equal Protection analysis, strict scrutiny is employed when a governmental body creates a classification that burdens a fundamental right[24] or targets a suspect class. Regents of University of

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[22] See City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 469, 105 S. Ct. 3249, 3269 (1985) (stating that "*Plyler*, for example, held that the status of being an undocumented alien is not a 'constitutional irrelevancy,' and therefore declined to review with strict scrutiny classifications affecting undocumented aliens").

[23] See generally, David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis, 2001 Supreme Court Review 47, esp. at 48, 86-87, 92-97, 107 (". . . I believe that the categorical approach still holds up and justifies a major distinction between LPRs [lawful permanent residents] and other aliens for constitutional purposes.").

[24] The practice of law is not a fundamental right assertable by the plaintiffs, discussed infra.

(...continued)

California v. Bakke, 438 U.S. 265, 357, 98 S. Ct. 2733, 2782 (1978). Although classifications based on alienage are inherently suspect and subject to close judicial scrutiny as a general matter, the Court's decisions have "never suggested that such legislation is inherently invalid, nor [has the Court] held that all limitations on aliens are suspect." See Foley v. Connelie, 435 U.S. 291, 294, 98 S. Ct. 1067, 1070 (1978) (internal citation omitted).

Beginning in 1971, the Court has applied some variation of strict scrutiny to invalidate state laws affecting "resident aliens" or "permanent resident aliens." See Graham v. Richardson, 403 U.S. 365, 371, 91 S. Ct. 1848, 1851 (1971) (applying "strict judicial scrutiny" and striking state laws that denied "resident aliens" disability benefits).[25] The Court has never applied strict scrutiny review to a state law affecting any other alienage classifications, e.g., illegal aliens, the children of illegal aliens, or nonimmigrant aliens. In such cases, the Court has either foregone Equal Protection analysis, see Toll v. Moreno, 458 U.S. 1, 102 S. Ct. 2977 (1982) (nonimmigrant G-4 aliens); DeCanas v. Bica, 424 U.S. 351, 96 S. Ct. 933

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[25] See also Griffiths, supra (applying "close judicial scrutiny"); Exam. Bd. Eng'rs v. De Otero, 426 U.S. 572, 602, 96 S. Ct. 2264, 2281 (applying "strict judicial scrutiny" and striking a law of Puerto Rico that prevented "resident aliens" from obtaining engineering licenses); Nyquist v. Mauclet, 432 U.S. 1, 7, 97 S. Ct. 2120, 2124 (1977) (applying "close judicial scrutiny" and striking a state law that prevented "permanent resident aliens" from receiving state financial assistance for higher education). These cases, especially Graham, follow from the Court's 1948 decision in Takahashi v. Fish and Game Comm'n, wherein the Court invalidated, on Supremacy Clause grounds, a California law that prevented resident aliens ineligible for citizenship from obtaining state fishing licences as inconsistent with Congressional determination to admit such aliens without burden or restriction. 334 U.S. 410, 419, 68 S. Ct. 1138, 1142 (1948).

(1976) (illegal aliens),[26] or has applied a modified rational basis review, see Plyler v. Doe, 457 U.S. 202, 102 S. Ct. 2382 (1982) (children of illegal aliens). In the latter case, Plyler, the Court employed a heightened level of rational basis review to invalidate a Texas law that denied primary public education to children of illegal aliens. See Plyler, 457 U.S. at 224, 102 S. Ct. at 2398 ("[the Texas law] can hardly be considered rational unless it furthers some substantial goal of the State.") (emphasis added).[27] Yet, while adopting a sui generis level of rational basis review, the Court acknowledged that the immigration status of the affected class of aliens precluded use of either intermediate or strict scrutiny review.[28]

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[26] Toll involved a University of Maryland policy that denied in-state tuition fees to domiciled G-4 nonimmigrant aliens and their dependents. The Court invalidated the policy on Supremacy Clause grounds, discussed infra, and expressly declined to reach the nonimmigrants' Due Process and Equal Protection claims. Toll, 458 U.S. at 9-10, 102 S. Ct. at 2982. In DeCanas, the Court reviewed a California law that prohibited the knowing employment of illegal aliens where such would adversely affect resident alien workers. The Court upheld the state law on Supremacy Clause grounds, discussed infra. DeCanas, 424 U.S. at 354-363, 96 S. Ct. at 936-940. In both Toll and DeCanas, the Court addressed state laws that not only affected but also drew distinctions among aliens in formulating state policies, yet in neither case did the Court employ Equal Protection analysis.

[27] The compromised level of rational basis review is recognized in the concurring opinion of Justice Powell, id. at 238, 102 S.Ct at 2406 (approving the heightened rational basis analysis in the "unique circumstances" of this case), and the dissenting opinion of Justice Burger, id. at 244, 102 S. Ct. at 2409, (disagreeing that the unfortunate circumstance of illegal alien children entitles them to "special solicitude under the Equal Protection Clause").

[28] In determining that proper level of review to apply in that case, the Court stated:

> Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a

(...continued)

The development of this jurisprudence is consistent with the Court's fundamental rationale for applying strict scrutiny review exclusively to resident aliens: "[T]he state laws at issue in Graham, Nyquist, DeOtero, and Griffiths warranted close judicial scrutiny because they took position[s] seemingly inconsistent with the congressional determination to admit the alien to permanent residence." See Foley, 435 U.S. at 295, 98 S. Ct. at 1070 (emphasis added). The Court has uniformly focused on two conditions particular to resident alien status in justifying strict scrutiny review of state laws affecting resident aliens: (1) the inability of resident aliens to exert political power in their own interest given their status as virtual citizens; and (2) the similarity of resident aliens and citizens.

Given the extent to which resident aliens are legally entrenched in American society, their inability to participate in the political process qualifies them as "a prime example of a discrete and insular minority for whom [] heightened judicial solicitude is appropriate." See Griffiths, 413 U.S. at 721, 93 S. Ct. at 2854-55 (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152-53, n.4, 58 S. Ct. 778, 783-84, n.4 (1938)).[29] Characterizing resident aliens as a Carolene Products minority reconciles

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> fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population.

Plyler, 457 U.S. at 223, 102 S. Ct. at 2398. See id. at 218, n.16, 102 S. Ct. at 2395, n.16 (discussing but not applying intermediate scrutiny review).

[29] See also Graham, 403 U.S. at 373, 91 S. Ct. at 1852; Griffiths, 413 U.S. at 721, 93 S. Ct. at 2854-55; Nyquist, 432 U.S. at 17, 97 S. Ct. at 2129. See also Bakke, 438 U.S. at 290, 98 S. Ct. at 2748 (stating that Carolene Products insularity "may be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination").

the breadth of rights and responsibilities they enjoy with their lack of political capacity.[30] Contrary to the plaintiffs' contention, nonimmigrant aliens — who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here — need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone.[31] Nonimmigrant aliens may, of course, qualify for anti-discrimination protection based upon race, sex, national origin and religious adherence, just as they may otherwise enjoy the benefits of American law.[32] But their lack of legal capacity, unlike that of immigrant aliens, is tied to their temporary connection to this country. Moreover, the numerous variations among nonimmigrant aliens' admission status make it inaccurate to describe them as a class that is "discrete" or "insular."[33] Nonimmigrant aliens, in short, do not warrant Carolene Products status.

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[30] In Foley, the Court stated that:

> beginning with a case which involved the denial of welfare assistance essential to life itself, the Court has treated certain restrictions on aliens with 'heightened judicial solicitude,' Graham v. Richardson, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852 (1971), a treatment deemed necessary since aliens – pending their eligibility for citizenship – have no direct voice in the political processes. See United States v. Carolene Prods. Co., 304 U.S. 144, 152-153, 58 S. Ct. 778, 783-784 (1938).

435 U.S. at 294, 98 S. Ct. at 1070 (citation marks edited).

[31] Cf., Lea Brilmayer, Carolene, Conflicts, and the Fate of the "Insider-Outsider," 134 U. Pa. L. Rev. 1291 (1986).

[32] See e.g., 8 U.S.C. § 1324(b) (prohibiting "unfair immigration-related employment practices").

[33] The Court makes this very point in Toll, stating that:

(...continued)

The Court's treatment of resident aliens also rests upon pragmatic recognition that resident aliens are similarly situated to citizens in their economic, social, and civic (as opposed to political)[34] conditions. In Griffiths, the Court observed:

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in a myriad of other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Griffiths, 413 U.S. at 722, 93 S. Ct. at 2855.[35] Like citizens, resident aliens may not be deported, are entitled

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> We noted that as to some categories of nonimmigrant aliens [B, F, and H visa holders], Congress had expressly conditioned admission ... on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States . . . . With respect to G-4 nonimmigrant aliens, however, we concluded that Congress had deliberately declined to impose restrictions on intent, thereby permitting them to adopt the United States as their domicile.

458 U.S. at 7, n.8, 102 S. Ct. at 2980, n.8 (internal marks and citations omitted).

[34] The Court has expressly declined to extend politically-oriented rights and opportunities to aliens. See Foley, 435 U.S. 291, 98 S. Ct. 1067 (applying rational basis review and upholding a state law that conditioned employment as a state trooper on citizenship because the law implicated rights of governance); Cabell v. Cajvez-Salido, 454 U.S. 432, 444-47, 102 S. Ct. 735, 742-44 (1982) (applying "lower level scrutiny" and extending Foley to uphold a state law conditioning employment as a probation officer on citizenship).

[35] See also Graham, 403 U.S. at 376, 91 S. Ct. at 1854 ("Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short term residents in Shapiro, aliens may live within the United States for many years, work in the State and contribute to the economic growth of the State. There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of a state"); Matthews v. Diaz, 426 U.S. 67, 83, 96 S.
(...continued)

to reside permanently in the United States,[36] may serve, voluntarily or by conscription, in the military,[37] are entitled to state aid benefits,[38] and pay taxes on the same bases as citizens.[39]

Nonimmigrant aliens' status is far more constricted than that of resident aliens. Nonimmigrant aliens are admitted to the United States only for the duration of their status,[40] and on the express condition

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Ct. 1883, 1893, 48 L.Ed.2d 478 (1976) ("citizens and those who are most like citizens qualify. Those who are less like citizens do not."); Nyquist, 432 U.S. at 12, 97 S. Ct. at 2126-27 ("Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis.").

[36] Title 8 U.S.C. § 1101(a)(20) provides that:

> The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

[37] Title 10 U.S.C. § 3253 provides that:

> In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

See also 10 U.S.C. § 8253 (same).

[38] Graham, 403 U.S. at 371, 91 S. Ct. at 1851; Nyquist, 432 U.S. at 12, 97 S. Ct. at 2127.

[39] Pursuant to the U.S. Tax Guide for Aliens "Resident aliens generally are taxed on their worldwide income, the same as U.S. citizens." IRS Pub. 519, 2003 WL 23305933 (I.R.S.).

[40] 8 C.F.R. § 214.2(f)(5)(I) provides that:

(...continued)

they have "no intention of abandoning" their countries of origin and do not intend to seek permanent residence in the United States.[41] They are admitted, remain, and must depart at the discretion of the Attorney General.[42] Plaintiffs acknowledge that nonimmigrant aliens may not serve in the U.S. military,[43] are subject to strict employment restrictions,[44] incur differential tax

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> [d]uration of status is defined as the time during which an F-1 student is pursuing a full course of study at an educational institution . . . .

[41] 8 U.S.C. §§ 1101(a)(15(F), (H), (J); Steel, at §3:11, 3-35.

[42] Title 8 U.S.C. § 1227(a)(1)(C) provides that:

> Any alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if . . . alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

Pursuant to 8 C.F.R. § 241.1(a)(3):

> At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay, or upon abandonment of his or her authorised nonimmigrant status.

See also 8 U.S.C. § 1184 (explaining the manner in which the Attorney General's discretion pertains to various nonimmigrant alien categories).

[43] 10 U.S.C. § 3253.

[44] See 8 C.F.R. § 214.1(e) (nonimmigrant aliens may not engage in productive employment without authorization); 8 C.F.R. § 214.2(f) (prohibiting F-1 visa holders from obtaining gainful employment, not including work-study and internship programs); 8 C.F.R. § 214.2(h) (permitting temporary employment of H-1B nonimmigrants); 8 C.F.R. § 214.2(l)(prohibiting L-2 spouses from obtaining employment without prior authorization). The penalty for unauthorized employment is a determination of "failure to maintain status." 8 C.F.R. § 214.1(e). The (...continued)

treatment,[45] and may be denied federal welfare benefits.[46] Finally, the Supreme Court has yet expressly to bestow equal protection status on nonimmigrant aliens.[47]

Based on the aggregate factual and legal distinctions between resident aliens and nonimmigrant aliens, we conclude that although aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to have state legislative classifications concerning them subjected to strict scrutiny. We decline to extend the Supreme Court's decisions concerning resident aliens to different alien categories when the Court itself has shied away from such expansion. We thus turn to the plaintiffs' alternative Equal Protection arguments.

Contrary to the plaintiffs' contention, there is no precedential basis for the proposition that nonimmigrant aliens are a quasi-suspect class or that state laws affecting them are subject to intermediate scrutiny. The decision in United States v. Virginia, 518 U.S. 515, 116 S.

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gainful employment ban may also be excepted in other cases of financial hardship. Steel, at 3-40-42.

[45] Pursuant to the U.S. Tax Guide for Aliens, as compared to resident aliens and citizens, "Nonresident aliens are taxed only on their income from sources within the United States and on certain income connected with the conduct of a trade or business in the United States." IRS PUB. 519, 2003 WL 23305933 (I.R.S.).

[46] Matthews, 426 U.S. at 83, 96 S. Ct. at 1893. See also 26 U.S.C. § 3306(c)(8) (amended by the AMERICAN JOBS CREATION ACT OF 2004, PL 108-357, October 22, 2004, 118 STAT 1418 and the RONALD W. REAGAN NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2005, PL 108-375, October 28, 2004, 118 STAT 1811).

[47] Toll, 458 U.S. at 9-10, 102 S. Ct. at 2982 (refusing to reach equal protection argument). Plyler is not to the contrary, as it involved the special class of alien children, who were not responsible for their immigration status, and the provision of education.

Ct. 2264 (1996), which reinforced caselaw that treats gender as a "quasi-suspect classification," furnishes no authority for the application of intermediate Equal Protection analysis to alienage classifications. Virginia, 518 U.S. at 532-33, 116 S. Ct. at 2275. Again, we decline to move where the Supreme Court has not gone.

By process of elimination, rational basis review must be the appropriate standard for evaluating state law classifications affecting nonimmigrant aliens. Here, caselaw has distinguished between traditional rational basis review and heightened rational basis review. But, the latter standard appears solely in Plyler, which, as noted, is a far different case from the case at bar. There, after declaring that undocumented aliens are not a suspect class[48] and that education is not a fundamental right, see id., 457 U.S. at 223, 102 S. Ct. at 2398, the Court found the children of illegal aliens, having no culpability for or control over their condition, are worthy of "special judicial solicitude" in the form of heightened rational basis review. Id. Thus, the Court elevated the rational basis test and inquired whether the Texas law "furthered some substantial goal of the state." Id. at 224, 102 S. Ct. at 2398 (emphasis added). Had the Court not modified rational basis review in Plyler, the Texas law would have survived. As articulated by the Court, traditional rational basis analysis provides that:

> The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications

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[48] Under the plaintiffs' rationale — that lack of political capacity alone should render an alien group worthy of heightened judicial solicitude and strict scrutiny review — undocumented aliens would be the most insular and deserving of Carolene Products minority status. Yet, the Court specifically denied them suspect status.

> that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears **some fair** relationship to a legitimate public purpose.

Id. 457 U.S. at 216, 102 S. Ct. at 2394 (emphasis added). Under the traditional test, Texas's legitimate interests — conservation of budget resources and deterrence of illegal immigration — probably would have been sufficient to justify the state's decision to deny state benefits to illegal entrants and their children. But in this unique instance, the Court was moved by the consequences and unfairness of enforcing such a regulation against children. Id. at 220, 102 S. Ct. at 2396.[49]

These plaintiffs who would be Louisiana lawyers find no support in Plyler. As nonimmigrant aliens, they entered this country voluntarily and with an understanding of their limited, temporary status. They face no hurdle as debilitating as denial of primary and secondary education. That, under Section 3(B), they are denied the ability to engage in a specific type of legal work — that requiring a license — is simply not analogous to the plight of illegal alien children. Nothing in Plyler compels the determination that nonimmigrant alien law students and temporary workers are similarly situated to the children of illegal aliens, and, thus, entitled to similar heightened rational basis review.

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[49] The Court's invalidation of the Texas law further rested upon a determination that the state's action was not in accord with congressional policy. Id. at 224-25, 102 S. Ct. at 2399.

Under traditional rational basis analysis, a state law classification that "neither burdens a fundamental right nor targets a suspect class" will be upheld "so long as it bears a rational relation to some legitimate end." Vacco v. Quill, 521 U.S. 793, 799, 117 S. Ct. 2293, 2297 (1997) (emphasis added). The key principle is the deference to legislative policy decisions embodied in courts' reluctance to judge the wisdom, fairness, logic or desirability of those choices. Viewed through this deferential lens, Section 3(B)'s classification bears a rational relationship to legitimate state interests — Louisiana's substantial interest in regulating the practice of those it admits to its bar. Section 3(B) aims to assure clients that attorneys licensed by the Louisiana Bar will provide continuity and accountability in legal representation. The Bar's ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar requires that it be able to locate lawyers under its jurisdiction. The State's determination that the easily terminable status of nonimmigrant aliens would impair these interests and their enforcement capacity is not irrational.

The plaintiffs argue that in focusing on the alleged transience of nonimmigrant aliens, Section 3(B) irrationally fails to deal with other causes of lawyer nonfeasance. While it is true that any attorney, regardless of citizenship status, could fall ill, become unavailable to clients, or leave the jurisdiction (and many actually do leave), such concerns are distinct from the special quandary arising from the federally prescribed transience of nonimmigrant aliens. The problem perceived by the defendants is that if a nonimmigrant practitioner leaves the country (voluntarily or by compulsion) to the detriment of Louisiana clients, such an attorney would be utterly beyond the reach of the Louisiana Bar. Contrary to the plaintiffs' contentions, the international transience of nonimmigrant alien practitioners is not analogous to that of a citizen or

immigrant alien practitioner who leaves Louisiana. State reciprocity and interstate bar agreements would allow the Louisiana Bar to pursue an attorney who relocates domestically, but there is no doctrine of international reciprocity enabling the Louisiana Bar to reach a malfeasant or nonfeasant nonimmigrant attorney who has fled the United States. Even if the Bar tracked down such an attorney in a foreign country, because nonimmigrants (in contrast to citizens and immigrant aliens) may not establish domicile in the United States and will usually have limited assets here, Louisiana courts would have questionable ability to exercise jurisdiction over such a person. The state would be impotent to remedy unethical or incompetent conduct, and a Louisiana client's ability to seek redress would be frustrated. Section 3(B) is underinclusive with respect to all possible foreseeable types of attorney abandonment, but it is not irrationally underinclusive with respect to this particularly troublesome situation.[50]

In these ways, Section 3(B), which limits Bar admission to persons able to live and work permanently in the United States, is rationally related to the state's interest in assuring continuity and accountability in legal representation. Section 3(B) does not make the mistake, remedied in Griffiths, of denigrating aliens in general. Instead, Section 3(B) recognizes that the inherent terms

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[50] In concluding that the Bar Committee in Griffiths failed to establish the necessity of excluding "all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards[,]" the Court noted that "once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts . . . . the range of postadmission sanctions extends from judgments for contempt to criminal prosecutions and disbarment." 413 U.S. at 727, 93 S. Ct. at 2857-58. The Louisiana Bar's concern that the temporary status of student and H-1B temporary worker visa holders might frustrate its ability to carry out these functions is legitimate.

and conditions of nonimmigrant status all but assure a lack of continuity and impairment of the Bar's ability to carry out its regulatory and police functions. As such, Section 3(B) is a proper exercise of Louisiana's police powers in pursuit of these interests.

Plaintiffs also complain that Section 3(B) is irrationally overinclusive because it assumes that nonimmigrant alien practitioners will be transient, when in fact they are just as likely, having gone to the trouble to be admitted to the Louisiana Bar, to extend their stays in this country. The plaintiffs' argument is plausible, but no more so than the state's contrary hypothesis. Moreover, unlike American citizens who seek admission to the bar in a state where they do not reside, the nature of nonimmigrant transience is substantially different — nonimmigrant aliens cannot unilaterally change their transient or noncitizen status.

The plaintiffs also generally criticize Section 3(B) as overbroad (e.g., because H-1B nonimmigrants must be sponsored by an employer, who in a case of malfeasance, may be ethically responsible for the attorney's misdeeds) and imprecise in achieving its desired ends. Even if it is flawed, the provision cannot be legitimately characterized as arbitrary or irrational. A court's inquiry is not for legislative precision, acuity, or acumen. See Romer v. Evans, 517 U.S. 620, 632, 116 S. Ct. 1620, 1627 (1996) (stating that "[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous"). Section 3(B) may be undesirable in an increasingly globalized commercial climate, but our perception of the wisdom of the measure fails to render it constitutionally infirm under traditional rational basis review. Section 3(B) need only be rationally related to some legitimate end. Romer, 517 U.S. at 632, 116 S. Ct. at 1627. Section 3(B) is, at the least, "roughly

approximate" to the concerns identified by Louisiana, given "limitations on the practical ability of the state to remedy every ill." Plyler, 457 U.S. at 216, 102 S. Ct. at 2394.

Because Section 3(B) serves a legitimate end, and there is no basis for applying a heightened level of scrutiny, it survives rational basis review.

2. Due Process

The LeClerc plaintiffs assert procedural due process challenges to Section 3(B). As aliens, they are "'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." Plyler, 457 U.S. at 210, 102 S. Ct. at 2391 (citations omitted).[51] Procedural due process entitles a person to a hearing before being deprived of an interest protected by the Fourteenth Amendment. Bd. of Regents v. Roth, 408 U.S. 564, 570, 92 S. Ct. 2701, 2705 (1972). As relevant here, "the existence of . . . eligibility rules" gives a party seeking admission to practice his chosen profession "an interest and claim to practice . . . to which procedural due process requirements appl[y]." Roth, 408 U.S. at 577, n.15, 92 S. Ct. at 2709, n.15 (internal citation omitted). However, procedural due process rights do not vest in a party who has failed to seek a hearing before filing suit. Goldsmith v. United State Bd. of Tax Appeals, 270 U.S. 117, 123, 46 S. Ct. 215, 218 (1926); See also Myrick v. City of Dallas, 810 F.2d 1382, 1388 (5th Cir. 1987) (holding that a complainant "cannot skip an available state remedy and then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy"). Although Louisiana's Bar admission rules gave the plaintiffs an interest to which

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[51] The Privileges and Immunities Clause protects only citizens. Compare Frazier v. Heebe, 482 U.S. 641, 107 S. Ct. 2607 (1987).

procedural due process rights attached, the plaintiffs cannot state a claim for a procedural due process violation because they opted not to appeal under Section 9.

3. Supremacy Clause and Preemption

The plaintiffs maintain that Section 3(B) is preempted by the comprehensive statutory scheme embodied in the Immigration and Nationality Act ("INA") and conflicts with some of its specific provisions.[52] Despite the federal government's primacy over the regulation of immigration, not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per-se preempted . . . ." DeCanas, 424 U.S. at 355, 96 S. Ct. at 936. The Constitution, by committing regulation of immigration to the federal government, did not deprive the states of all power to legislate regarding aliens.[53] Id. Nevertheless, ostensibly harmonious state regulation may run afoul of the Supremacy Clause if it, in effect, interferes with the goals of federal policy. Id. Yet, even in this context, "[f]ederal regulation . . . should not be deemed preemptive in the absence of persuasive reasons — either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." Id. at 356, 96 S. Ct. at 937 (internal citation omitted).

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[52] The LeClerc plaintiffs further contend that NAFTA and GATS, which they argue are intended to liberalize United States licensing and certification requirements, evince congressional intent to preempt restrictive state licensing schemes. The LeClerc plaintiffs' arguments concerning NAFTA and GATS are, respectively, inapposite and unpreserved.

[53] See Plyler, 457 U.S. at 229, n.19, 102 S.Ct at 2396, n.19 ("If the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction") (citing DeCanas, 424 U.S. 351, 96 S. Ct. 933).

Section 3(B) is unquestionably a permissible exercise of Louisiana's broad police powers to regulate employment within its jurisdiction for the protection of its residents. See id. at 356, 96 S. Ct. at 937 (explaining that a state has "broad . . . police powers" to regulate employment within its borders). The Louisiana Supreme Court was rationally entitled to conclude that the temporary status of nonimmigrant aliens could impede the Bar's regulatory and disciplinary efforts.[54] Conditions that frustrate the administration of Louisiana's licensing scheme are "certainly within the mainstream of such police power regulation." Id. at 356-57, 96 S. Ct. at 937.

Further, as a state regulation dealing with the employment of nonimmigrant aliens, Section 3(B) is not facially preempted by the INA. The Supreme Court has acknowledged that "there is no indication that Congress intended to preclude state law in the area of [alien] employment regulation." Id. at 358, 362, 96 S. Ct. at 937-38, 940. Thus, the field of alien employment tolerates harmonious state regulation.

The fact that Section 3(B) denies Bar admission to some aliens and not to others conflicts neither with the INA nor with the Supreme Court's disposition in Toll. In Toll, the Court invalidated a University of Maryland policy denying in-state tuition status to G-4 nonimmigrant aliens — who are permitted by congressional directive to establish domicile in the United States — as inconsistent with federal policy that prevented these student aliens from establishing state domicile. Toll, 458 U.S. at 11, 102 S. Ct. at 2983. Toll held that, "state regulation not congressionally sanctioned that

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[54] Contrary to the plaintiffs' contentions, the status of bar admission rules in other states is neither controlling nor persuasive. A situation discerned as problematic by the state need not be viewed as pervasive or universal in order to justify the state's attempt to address it.

discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress." However, the Court added a caveat:

> To be sure, when Congress has done nothing more than permit a class of aliens to enter the country temporarily, the proper application of the principle is likely to be a matter of some dispute.

Toll 458 U.S. at 12-13, 102 S. Ct. at 2983 (quoting, in part, DeCanas, 424 U.S. at 358, n.6, 96 S. Ct. at 938, n.6). The substantive holding in Toll is distinguishable from the instant case for two reasons. First, Section 3(B) raises the situation contemplated, but not addressed, in Toll — the validity of state laws affecting transient nonimmigrant aliens. Second, there is no incongruity between what Congress permits of student and temporary worker nonimmigrants and what Section 3(B) prevents.

First, as with the alien class in general, the sub-class of nonimmigrant aliens is itself heterogenous, and the distinctions among them are relevant for preemption purposes. Toll specifically distinguished between G-4 nonimmigrant aliens — upon whom Congress expressly declined to impose domicile restrictions — and the F-1 student and H-1B temporary worker nonimmigrant aliens at issue in this case — upon whom Congress has clearly imposed domicile restrictions.[55] Section 3(B) affects only the latter group.

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[55] As the Court stated in Toll:

> [T]he nonimmigrant classification is by no means homogeneous . . . . For example, Congress expressly conditioned admission for some purposes on an intent notto abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States . . . . [A] nonimmigrant student is defined as "an alien having a

(...continued)

Second, Section 3(B) does not succumb to the Toll infirmity of proscribing by state law what Congress expressly permits by federal statute. Section 3(B) does not prevent the legal matriculation of nonimmigrant alien students admitted to the United States on F-1 or J-1 visas. Section 3(B) is, in fact, consistent with provisions that prohibit student visa holders from obtaining gainful employment, require them to obtain specific authorization for certain types of matriculation-related employment, e.g., internships and work-study programs, requires their departure at the expiration of their status, and prohibits them from establishing domicile in the United States.

Nor does Section 3(B), contrary to plaintiffs' contentions, prevent them from complying with H-1B nonimmigrant visa requirements. H-1B status requires the nonimmigrant applicant to qualify for a temporary worker visa by presenting documentation of: a state professional license; a bachelor's, or higher, degree in the profession; an equivalent foreign degree; or equivalent foreign experience. 8 C.F.R. § 214.2(h). H-1B's four compliance measures are disjunctive; its professional licensing option is permissive, not mandatory. While Section 3(B) permits one of these alternatives, it does not

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> residence in a foreign country which he has no intention of abandoning . . . and who seeks to enter the United States temporarily and solely for . . . study . . . ." § 101(a)(15)(F). See also . . . § 101(a)(15)(H) (temporary worker having residence in foreign country "which he has no intention of abandoning"). . . . But Congress did not restrict every nonimmigrant class. In particular, no restrictions on a nonimmigrant's intent were placed on [G-4] aliens . . . [T]his was deliberate . . . confirmed by the regulations . . . which provide that G-4 aliens are admitted for an indefinite period . . . .

Toll, 435 U.S. 647, 665, 98 S. Ct. 1338, 1349 (emphasis added). See also Toll II, 458 U.S. at 7, n.8, 102 S. Ct. at 2980, n.8 (citing Toll, 435 at 665, 98 S. Ct. at 1349 and 8 U.S.C. §§ 1101(a)(15)(B), (F), (H)).

prevent an H-1B visa holder who satisfies at least one of the other compliance methods from obtaining employment within the broad field encompassed by the practice of law. Moreover, Section 3(B) is consistent with an H-1B visa provision that contemplates non-licensed employment.[56] As demonstrated, Section 3(B) is in accord, rather than conflict, with federal regulation of alien employment.

The plaintiffs finally argue that the INA impliedly preempts Section 3(B) because it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." DeCanas, 424 U.S. at 363, 96 S. Ct. at 940. We disagree. As the Court made clear in DeCanas, the intersection of state and federal law does not necessarily require or effect preemption. Upholding a California law criminalizing the employment of illegal aliens, DeCanas held that the overlap of state and federal law did not equate to "withdrawal from the States of power to regulate where the activity regulated was a mere peripheral concern" to the federal law. Id. at 361, 96 S. Ct. at 939. Similarly, while Section 3(B) prohibits Bar admission of nonimmigrant aliens even though the INA permits H-1B visa holders to seek professional licensing, the provision is "peripheral" to intersecting federal law which does not itself mandate domestic professional licensing.

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[56] 8 C.F.R. § 214.2(h) provides that:

> Duties without licensure. In certain occupations which generally require licensure, a state may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, the director shall examine the nature of the duties and the level at which they are performed. If the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted.

Section 3(B) is a state Bar rule designed to address local problems arising from the transitory status of nonimmigrant aliens who, by the terms and conditions of their federal status, possess fewer ties to the United States than any other group (besides illegal aliens). Section 3(B) attempts to protect Louisiana residents seeking legal representation and affects a class of persons whom Congress has expressly prohibited from living or working permanently in the United States. See id. at 363, 96 S. Ct. at 940 (explaining that although federal law predominates in the field of immigration, there is minimal federal interest in state laws crafted to address local problems and affecting local entities in a manner consistent with federal declarations). Rather than standing as an obstacle to federal law, Section 3(B) is consistent with the federal policy embodied in the INA.

CONCLUSION

For the reasons stated herein, the judgment in LeClerc, et al. v. Webb, et al., 270 F. Supp. 2d 779 (E.D. La. 2003) is **AFFIRMED**. The judgment in Wallace, et. al. v. Calogero, et al., 286 F. Supp. 2d 748 (E.D. La. 2003) is **REVERSED**.

CARL E. STEWART, Circuit Judge, concurring in part and dissenting in part:

I concur in the panel's majority decision affirming the district courts' rulings that: (1) Section 3(B) is not preempted by federal immigration or trade policy; (2) the defendants' jurisdiction arguments should be denied; (3) the plaintiffs' due process arguments should be dismissed, (4) plaintiff Affleck lacked standing to assert a claim under the NAFTA, and (5) the Leclerc plaintiffs' motion to reconsider should be denied. For the following reasons, I respectfully dissent from the majority's conclusion that the plaintiffs' Equal Protection claim should be dismissed.

First, I disagree with the majority's conclusion that strict scrutiny review should not apply to the issue before us. The Supreme Court in Graham v. Richardson held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." 403 U.S. 365, 372 (1971)(internal citation omitted); see also Applications of Griffiths, 413 U.S. 717, 721 (1973). It should be noted that not all limitations on aliens are suspect. See Foley v. Connelie, 435 U.S. 291, 294 (1978). Although the general rule is that classifications of aliens are suspect and strict scrutiny should apply, the Court has also held that less than strict scrutiny is warranted where a state law discriminates based on alienage classification regarding matters related to the democratic process. Id. ("a democratic society can be ruled by its own people"). Also, because Congress has plenary power to regulate immigration, federal statutes and presidential orders that discriminate against aliens are also reviewed with something less than strict scrutiny. Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("the relationship between the U.S. and our alien visitors has been committed to the political branches of the federal government. Since decisions in these matters may implicate our relations with foreign powers . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive branches than to the Judiciary."). In all other circumstances, the Supreme Court has applied strict scrutiny to classifications based on alienage. Alienage is defined as the state or condition of being an alien. BLACK'S LAW DICTIONARY 79 (8th ed. 1999). An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The majority is wary about "expanding" strict scrutiny review to nonimmigrant aliens as a distinctive suspect class in the absence of a black letter holding by the U.S. Supreme Court to that effect. I

disagree with the majority's reservations because the Supreme Court's statement that "alienage is a suspect class" by definition includes nonimmigrant aliens as part of that class.

The majority emphasizes that, as opposed to the Rule at issue here, "the rule at issue in Griffiths effected a 'total exclusion [of all] aliens from the practice of law' in Connecticut." Proposed Op. at 15. However, the Supreme Court has stated that "[t]he fact that the [challenged] statute is not an absolute bar [against all aliens] does not mean that it does not discriminate against the class." Nyquist v. Mauclet, 432 U.S. 1, 9 (1977). It is only important that the Rule is directed at aliens and only aliens are harmed by it. Id. Section 3(b) only allows citizens and resident aliens to apply for admission to the Louisiana state bar. In re Bourke, 819 So.2d 1020, 1021 (La. 2002). Because the Louisiana Supreme Court has defined resident aliens as "aliens who have been granted permanent resident status in the United States," id., the Rule discriminates against all nonimmigrant aliens. The Rule does discriminate against the class because it is directed at aliens and only aliens are harmed by it.

In discussing the alien suspect class, the Supreme Court has referred to resident aliens, aliens and non-citizens interchangably. The majority uses the term resident aliens in referring to the suspect class first created in Graham v. Richardson. In order to properly understand the semantics in this case, it is necessary to explore the definitions used in the Immigration and Nationality Act (INA), 8 U.S.C. § 1101, *et seq*. All aliens legally admitted in the U.S. fall into one of two categories: immigrant (persons who want to become permanent residents) and non-immigrant (persons granted stay for a limited period of time). DAVID WEISSBRODT, IMMIGRATION LAW AND PROCEDURE § 5-1 - 6-1(4th ed. 1998). These two broad categories are each further divided into specific types of visas. Id. In the INA, there is no definition of

resident alien, only a definition of residence as referring "only to the place of general abode without regard to intention."[57] See 8 U.S.C. § 1101(a)(33). Thus, residence and immigration status should be understood as two separate distinctions; one does not necessarily have to do with the other. As the district court noted in Wallace v. Calogero, "the term 'resident alien' is broader than the Act's immigration categories and includes both immigrant and nonimmigrant aliens lawfully residing in the United States." 286 F. Supp. 2d 748, 762 (E.D. La. 2003). In other words, a nonimmigrant alien who lives in the United States is but one class of resident alien. I read the term "resident alien," as it is used in the Supreme Court's jurisprudence, as simply indicating that the alien resides in the United States. This point is further made clear by Justice Blackmun's majority opinion in Kleindienst v. Mandel, 408 U.S. 753 (1972). Justice Blackmun, the author of the majority opinion in Graham, used the term "nonresident alien" to refer to plaintiff Ernest Mandel, a Belgian citizen who resided in Brussels. 408 U.S. at 762.

The Court has not distinguished between immigrant aliens or nonimmigrants aliens when discussing the alienage suspect class even though the Court has had before it cases which involved extensive

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[57] Resident alien is essentially a tax distinction. See 26 U.S.C. § 7701(b). There are primarily two ways to determine whether one is a resident alien for tax purposes. The first is the green card test, if you have a green card, and therefore are a permanent resident, you are a resident under tax law. Id. at § 7701(b)(1)(A)(i). The other is the substantial presence test. Under the substantial presence test you will be considered a U.S. resident if you were physically present in the U.S. for at least 31 calendar days during the course of the year and 183 days during the 3 year period that includes the current year and two previous years immediately before it. Id. at § 7701(b)(3). Considering H-1B visa holders, for example, can stay in the country for up to 6 years, it is possible for an alien to be both a non-immigrant and pay taxes as a resident alien.

review of the Immigration and Naturalization Act and its various classifications for admitted aliens; the Court was not ignorant of the terminology associated with the INA's alien classifications nor presumably of the distinctions between these classifications. See e.g., Kleindienst, 408 U.S. at 753, 757 n.4 (holding that a Belgian citizen living in Brussels, "as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise"); see also Saxbe v. Bustos, 419 U.S. 65 (1974) (holding that daily and seasonal alien commuters qualify as immigrant aliens rather than as nonimmigrant aliens). Despite the Court's familiarity with the distinction between immigrant and nonimmigrant aliens, the Court has still spoken of a general "alien" suspect class.

The defendants and the majority rely heavily on the fact that the Court's cases that employ strict scrutiny analysis all involved plaintiffs who were permanent resident aliens.[58] However, I am not persuaded that based on this fact alone, the Court's strict scrutiny analysis should be restricted to laws that discriminate against permanent resident aliens. Again, the Supreme Court has not explicitly emphasized the alien plaintiffs' permanent resident status in discussing the alien suspect class. As the majority opinion observes, nonimmigrant aliens have come before the Court asserting Equal Protection claims. Twice the Court found it unnecessary to reach the Equal Protection issue, see Toll v. Moreno, 458 U.S. 1 (1982) and Decanas v. Bica, 424 U.S. 351 (1976), and once the Court applied rational basis review, see Plyler v. Doe, 457 U.S. 202 (1982). Although the Court applied rational basis

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[58] It should be noted that in some of the Supreme Court's opinions, the exact nature of the plaintiff's immigration status is unclear or not discussed. See e.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

review to the aliens in Plyler, as the majority notes, Plyler "is a far different case from the case at bar." Proposed Op. at 24. Plyler involved illegal aliens. In refusing to grant suspect classification to illegal aliens, the Court focused on their undocumented and unlawfully status. Plyer, 457 U.S. at 219 n.19. The nonimmigrant aliens here, by contrast, are lawfully admitted aliens. The Court's opinions have applied strict scrutiny review when the plaintiffs at issue are lawfully admitted aliens who reside in the United States, like the plaintiffs here. See e.g., Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948); Graham, 403 U.S. at 371.

The majority also relies heavily on the Supreme Court's statement in Griffiths that "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities." 413 U.S. at 722. Nonimmigrant aliens do pay taxes, support the economy and contribute in other ways to our society. See n.1, *supra*. Nonetheless, I am not persuaded that an aliens' ability to serve in the Armed Forces or pay taxes is the primary rationale for affording suspect class designation to aliens; after all aliens were afforded suspect class designation before Griffiths. See Graham, 403 U.S. 365. Instead, the basis for aliens' class designation seems to be premised on aliens' inability to vote, and thus their impotence in the political process, and the long history of invidious discrimination against them. See Plyer, 457 U.S. at 218 n.14 (citing Graham, 403 U.S. at 372); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 618-19 (1997). See generally Takahashi, 334 U.S. 410.

In order to distance nonimmigrant aliens from the class of "aliens" that the Supreme Court has recognized as inherently suspect, the majority emphasizes the temporary and "transient" status of nonimmigrant aliens.

However, the majority is unable to avoid the Supreme Court's ruling in Toll v. Moreno, which recognized that nonimmigrant aliens who hold a G-4 visa are aliens with permanent status similar to citizens and immigrant aliens. 458 U.S. 1 (1983); see also Elkins v. Moreno, 435 U.S. 647, 663-64 (1978). The majority vigorously asserts that G-4 nonimmigrant aliens are distinct from the nonimmigrant aliens here because the aliens here are "transient nonimmigrant aliens," a new alienage classification crafted by the majority's opinion only. However, the constitutional challenge here is not an as applied challenge to Section 3(b). The plaintiffs assert that the rule discriminates against all nonimmigrant aliens. Therefore, if one nonimmigrant alien group does not fit within the opinion's analysis– that nonimmigrant aliens are not a suspect class because they are not "permanent" residents– then the majority's argument as a whole must fail.

The majority states that "nonimmigrant aliens– who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here–need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone." Proposed Op. at 19. But, not all nonimmigrant aliens are required to keep a permanent residence abroad and are not allowed to intend to stay in the United States. Besides, G-4 nonimmigrant aliens, the Immigration Act of 1990 states that H-1 and L category visa holders (as some of the plaintiffs are here) do not have to pledge an intention to only stay in the United States temporarily, and can seek permanent residence in the United States. 22 C.F.R. § 41.11; 8 C.F.R. §§ 214.2 (h)(16), (1)(16); 68 No. 21 Interpreter Releases 681-84 (June 3, 1991). The BIA and the State Department also recognize the doctrine of dual intent, which allows nonimmigrant aliens who are required to keep a permanent residence in their foreign

country to both express a short term intent to remain in the United States temporarily (so as to not contravene the requirements of the visa under which they entered) and a long term intent to remain in the United States permanently (so that they may apply for adjustment of status). Matter of Hosseinpour, 15 I&N Dec. 191, 192 (BIA 1975); 70 No. 42 Interpreter Releases 1444, 1456-58 (No. 1, 1993).

I read the Supreme Court's jurisprudence to provide that nonimmigrant aliens, as persons who are not citizens nor nationals of this country, are part of the alien suspect class and therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny review. Because of the Court's opinions, the presumption should be that nonimmigrant aliens are part of the alien suspect class and the defendants should have the burden of proving the opposite. I am not persuaded by the arguments put forth by the defendants that the Supreme Court did not intend to include nonimmigrant aliens as part of the alienage suspect classification. Nevertheless, even assuming *arguendo* that rational basis is the appropriate analysis to be used in this case, I disagree with the majority's holding that the Louisiana rule survives rational basis review. To pass rational basis review, the defendants must show that nonimmigrant aliens pose some special threat to the State's legitimate interests, in a way that other permitted bar applicants, citizens or immigrant aliens, do not. See City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 447-50 (1985) ("it is true that the mentally retarded as a group are indeed different . . . [b]ut this difference is largely irrelevant unless the [group home] and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to

the city's legitimate interests, we affirm the judgment below ").

The majority opinion's discussion of the equal protection claim is most problematic at this point because it is in essence trying to "push a square peg into a round hole." The defendants assert that nonimmigrant aliens pose a special threat to the integrity of the Louisiana bar because they could be unexpectedly deported or they could leave and go back to their home country, leaving litigants in the lurch. The defendants assert that unlike citizens and immigrant aliens, nonimmigrant aliens are more susceptible to being "international transients." The Louisiana Supreme Court would be unable to reach malfeasant attorneys because the Louisiana bar does not have reciprocity with other nations and because nonimmigrant aliens are not able to establish domicile and, therefore, the state courts could not assert jurisdiction.

However true that may be, these concerns apply equally to both citizens and immigrant aliens. Citizens have a constitutional right to travel. Califano v. Gautier Torres, 435 U.S. 1 (1978). Although the Louisiana state bar may have reciprocity with other states, citizens could leave the country and establish residency abroad, and as the majority states, Louisiana does not have reciprocity with other nations. Likewise, immigrant aliens may travel abroad and not return, leaving clients behind. Moreover, both nonimmigrant aliens and immigrant aliens are subject to deportation; only citizens may not be deported. The majority asserts that nonimmigrant aliens pose a special threat to Louisiana clients because nonimmigrant aliens may not establish domicile or have assets in Louisiana and, therefore, the courts may be precluded from asserting jurisdiction over nonimmigrant attorneys should the need to reach them arise. But the Louisiana bar has no requirement that bar applicants, or bar members, be Louisiana residents or spend any time in

Louisiana or in any way have a connection with the state. Therefore, Louisiana courts may also be unable to assert jurisdiction over members of the Louisiana bar who are citizens or immigrant aliens. Moreover, it may be possible for nonimmigrant aliens to be domiciled in Louisiana–as the Supreme Court found that the nonimmigrant alien plaintiffs were in Toll. See 458 U.S. at 17. As the district court in Wallace averred:

> The Rule does not restrict membership to the bar to citizens and immigrant aliens who plan to reside permanently in Louisiana. Nonimmigrant aliens as a class are not necessarily more transient than other groups. Citizens and immigrant aliens may be admitted to the bar even if they have no intention of residing in Louisiana. Louisiana attorneys relocate to other states and maintain bar membership in states where they do not reside. Due to advances in technology, attorneys can provide services and representation to clients from virtually anywhere. Louisiana attorneys retire, die, and leave the practice for a myriad of reasons. If the Louisiana Supreme Court were concerned with transience, the Rule would be calculated to address that problem directly. However, the Rule only excludes a fraction of persons who may have temporary residence in the state. The fact that the Plaintiffs must leave on a date certain does not change the analysis. On the contrary, it might be an advantage. Plaintiffs will be able to plan in advance for their departure and make the necessary arrangements to protect the interests of their clients.

Wallace, 286 F. Supp.2d at 763.

In my view, the Louisiana rule does not pass constitutional muster under even the exceedingly permissive rational basis standard of review. The Rule at

issue is purported to be a prophylactic remedy to insulate potential clients from lawyers who are forced to leave the country unexpectedly, or who leave the country voluntarily, without an available means for the state courts to assert jurisdiction to reach the malfeasant attorneys. However, if the purpose of the Rule is to protect court dockets from disruption and protect the state's citizens from lawyers who may leave suddenly, the Rule is not the least restrictive way to do it nor, as the district court in Wallace noted, is the Rule in fact calculated to achieve this purpose.

For the foregoing reasons, I respectfully dissent from the majority's dismissal of the plaintiffs' Equal Protection claim and the reversal of the district court's judgment in Wallace v. Calogero.

DISTRICT COURT OPINION

United States District Court,
E.D. Louisiana.

Caroline WALLACE, et al.
v.
Pascal F. CALOGERO Jr., et al.

No. Civ.A. 03-1245.

Sept. 17, 2003.

ORDER AND REASONS

FALLON, District Judge.

Plaintiffs are nonimmigrant[1] aliens lawfully residing[2] in New Orleans, Louisiana who claim they have

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[1] An alien is defined under the Immigration and Nationality Act as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1999). A nonimmigrant alien is an alien who is granted temporary residence in the United States for specific purposes as outlined in the Immigration and Nationality Act. *See id.* § 1101(a)(15) (outlining classes of aliens eligible for temporary residence in the United States). An immigrant alien is an alien who is granted permanent residence in the United States. *See id.* (providing that all aliens are immigrant aliens unless they were granted admission to the United States as a nonimmigrant alien).

Plaintiffs and Defendants use different terms to refer to the immigration status of the Plaintiffs, such as temporary resident alien and non-resident alien. For the sake of precision, when discussing immigration status, this Court uses the statutory language, immigrant and nonimmigrant. When discussing issues related to residency, this Court uses permanent resident alien and nonpermanent resident alien.

[2] Under the Immigration and Nationality Act, the term "residence" means "the place of general abode; the place of general abode of a (...continued)

been denied membership in the Louisiana Bar Association because of their status. They have brought this suit against the members of the Louisiana Supreme Court in their official capacity and the Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions in their official capacity under 42 U.S.C. § 1983, challenging Louisiana Supreme Court Rule XVII, Section 3(B), which restricts bar membership to citizens and immigrant aliens. Plaintiffs seek declaratory and injunctive relief, as well as attorney's fees and costs.

Before the Court are the following motions: (1) Defendant's motion to dismiss (Rec.Doc. No. 15); and (2) Plaintiff's motion for summary judgment (Rec.Doc. No. 12).

I. Factual and Procedural Background

Louisiana Supreme Court Rule XVII, Section 3(B) requires every applicant for admission to the Louisiana Bar to be a citizen or resident alien of the United States. [3] Prior to 2002, the Louisiana Supreme Court interpreted the phrase "resident alien" contained in the Rule to mean an alien lawfully residing in the United States, including both immigrant and nonimmigrant aliens.[4] In 2002, the

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person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33).

[3] The Rule provides in pertinent part, "Every applicant for admission to the Bar of this state shall meet all of the following requirements ... (B) Be a citizen of the United States or a resident alien thereof...." La. S.Ct. R. XVII, § 3(B).

[4] *See In re Respondek*, 442 So.2d 435, 435 (La.1983) (holding that the phrase "resident alien" means an alien lawfully residing in the United States) *overruled by In re Bourke*, 819 So.2d 1020, 1022 (La.2002); *In re Appert*, 444 So.2d 1208, 1209 (La.1984) (stating that the Bar Committee is directed to consider foreign nationals lawfully residing in the United States as resident aliens) *overruled by In re Bourke*, 819 So.2d at 1022.

Louisiana Supreme Court overruled its prior rulings and held that the term "resident alien" applies only to immigrant aliens: that is, aliens permanently residing in the United States pursuant to immigrant visas. *In re Bourke*, 819 So.2d 1020, 1022 (La.2002).

Plaintiffs are citizens of the United Kingdom currently residing in the United States under nonimmigrant visas. Such nonimmigrant visas permit aliens to reside in the United States and provide a date certain on which they must leave the United States. 8 U.S.C. § 1101(26). Plaintiff Wallace received a diploma in legal practice with distinction from the College of Law in London in 1998. She is licensed to practice law in England and Wales and was admitted to the roll of solicitors in September, 2001. Plaintiff Wallace qualified to work as a paralegal at the Capital Post Conviction Project of Louisiana under an H-1B work visa.[5] Her visa expires in October, 2004, and she plans to apply for a three-year extension. She submitted an application to the Louisiana Committee on Bar Admissions ("the Committee") for an equivalency determination[6] in

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[5] An H-1B class alien is an alien "who is coming temporarily to the United States to perform services ... in a speciality occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b). To obtain an H-1B work visa, a U.S. employer must file an I-129 petition with the U.S.A. Immigration Services. If approved, the potential alien employee must show that the purpose of his trip is to enter the United States for business; that he plans to remain for a specific limited period; and that he has a residence outside of the U.S. as well as other binding ties which will insure his return abroad at the end of his visit. If issued, an H-1B visa expires at a date certain, up to three years from the date of issuance. The worker may apply for an extension of up to three years, with the total stay limited to six years maximum. *See* http://www.usais.org/businesspleasurevisitors.htm (providing information on nonimmigrant business and pleasure visas).

[6] Graduates of foreign law schools who seek admission to the Louisiana Bar must file an application for an equivalency determination to (...continued)

December 2001 and was told in November 2002 that her application was accepted. She was later told, however, that she was ineligible to take the Louisiana Bar Examination because she is not a permanent resident alien or a citizen of the United States.

Plaintiff Maw attended Tulane University School of Law under an F-1 student visa.[7] [She graduated with a *juris doctor* degree in May 2003. Her student visa included an Optional Practical Training authorization that expires in March, 2004, and she plans to apply for an H-1B work visa. It is not clear from the record whether Plaintiff Maw applied to take the Louisiana Bar Examination. In her affidavit, she states that she applied for admission to the Louisiana State Bar in 2001 based on reciprocity.[8] (Maw Aff. ¶ 6). The Complaint states that she applied to take the Louisiana Bar Examination. (Compl.¶ 19). In either case, she was told that she was ineligible for admission to the bar because she is not a permanent resident alien or citizen of the United States. Neither Plaintiff petitioned the Louisiana Supreme Court

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establish that the applicant's legal education is equivalent to that of a U.S. law school accredited by the American Bar Association. La. S.Ct. R. XVII, § 6.

[7] An F-1 class alien is an alien "having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study...." 8 U.S.C. § 1101(a)(15)(F)(I). The U.S.A. Immigration Services issues visas to students attending U.S. schools in two nonimmigrant categories: F visas are issued to students pursuing academic studies, and M visas are issued to students pursuing nonacademic or vocational studies. *See http://www.usais.org/studentvisas.htm* (providing information on student visas).

[8] La. S.Ct. R. XVII, § 11 provides the procedure for applying for admission to the bar based on reciprocity.

for a review of the Committee's denial of their respective applications.[9]

On May 2, 2003, Plaintiffs filed their original complaint seeking declaratory and injunctive relief as well as costs and attorney's fees. (Rec.Doc. No. 1). Plaintiffs named as defendants all seven Louisiana Supreme Court Justices-Pascal F. Calogero, Jr., Jeffrey P. Victory, Jeannette Theriot Knoll, Chet D. Traylor, Catherine D. Kimball, John L. Weimer, and Bernette J. Johnson-and the Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions-Daniel E. Webb and Harry J. Philips, Jr., respectively (collectively "Defendants"). All the Defendants were sued in their official capacities only.

Plaintiffs initially moved to have their case transferred to Judge Jay C. Zainey and consolidated with *Leclerc v. Webb*, 270 F.Supp.2d 779 (E.D.La.2003), which was then before him, arguing that the cases were factually and legally similar. (Rec.Doc. No. 2). After closely considering the matter, Judge Zainey denied Plaintiffs' motion, noting that none of the *Leclerc* plaintiffs graduated from an American Bar Association accredited law school like Plaintiff Maw in the instant matter. (Rec.Doc. No. 6). Based on this fact, Judge Zainey concluded that the respective plaintiffs were not similarly situated. Thus, the case remains with this Court.

Plaintiffs then filed a motion for summary judgment and Defendants filed a motion to dismiss on June 23, 2003, which were both heard with oral argument on August 20, 2003.

In their motion for summary judgment, Plaintiffs pray for a judgment:

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[9] La. S.Ct. R. XVII, § 9 provides the procedure for appealing the Committee's denial of eligibility for admission to the bar.

1. Declaring that Rule XVII Section 3(B) of the Rules of the Louisiana Supreme Court violates the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Supremacy Clause of Article VI of the United States Constitution and is unenforceable to the extent that it bars nonpermanent resident aliens from sitting for the Louisiana Bar Examination and from becoming members of the Louisiana State Bar;

2. Declaring that Defendants may not deny nonpermanent resident aliens, because of their nonpermanent alien status, the opportunity to sit for the Louisiana State Bar Examination and to be admitted to the Louisiana State Bar;

3. Awarding Plaintiffs their costs and attorney's fees as authorized by 42 U.S.C. § 1988 and granting such other and further relief as this Court deems just and proper.

Defendants assert that Plaintiffs fail to present a justiciable case or controversy because their claims are not ripe for adjudication and because Plaintiffs lack standing. Further, Defendants argue that Plaintiffs' claims are barred by the Eleventh Amendment and the doctrines of judicial and legislative immunity. Defendants additionally urge this Court to abstain from this matter. Finally, Defendants argue that Plaintiffs fail to state a claim upon which relief can be granted. The Court considers each argument in turn.

II. Defendants Motion to Dismiss

A. Legal Standards

A party may seek dismissal of a complaint based on lack of jurisdiction. Fed.R.Civ.P. 12(b)(1). Jurisdictional defects that warrant dismissal include immunity of the defendants in an action and the court's consequent lack of subject matter jurisdiction. *Bank One Texas v. United States,* 157 F.3d 397, 403 n. 12 (5th

Cir.1998). A party may also seek dismissal of a complaint that fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), a district court should construe the complaint liberally in favor of the plaintiff, assuming all factual allegations to be true. *Leleux v. United States,* 178 F.3d 750, 754 (5th Cir.1999). Rule 12(b)(6) motions are viewed with disfavor and are rarely granted. *Id.* A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Lowrey v. Texas A & M Univ. Sys.,* 117 F.3d 242, 247 (5th Cir.1997)).

B. Justiciable Claim or Controversy

Defendants claim that Plaintiffs fail to present an actual case or controversy as required by Article III, Section 2 of the United States Constitution. To interpret the requirements of Article III, the courts have developed a series of principles termed "justiciability doctrines." *United Transp. Union v. Foster,* 205 F.3d 851, 857 (5th Cir.2000). These principles include the doctrines of ripeness and standing which the Defendants claim are lacking in this case. *Id.*

1. Ripeness

The ripeness doctrine "separates those cases that are premature because the injury is speculative and may never occur from those that are appropriate for judicial review." *United Transp.,* 205 F.3d at 857. Although Plaintiffs seek declaratory relief which may typically be sought before an injury-in-fact has occurred, *Id.* (*citing Pic-A-State Pa., Inc. v. Reno,* 76 F.3d 1294, 1298 (3d Cir.1996)), they must still present an actual controversy for resolution. *Id.* (*citing Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), *overruled on other grounds, Califano v. Sanders,* 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977)). A case will be

dismissed for lack of ripeness when the case presents hypothetical or abstract issues. *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 833 F.2d 583, 586-87 (5th Cir.1987). To determine ripeness, courts consider the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* Generally, a case is ripe if the only remaining issues are legal ones and no further factual development is necessary. *Id.*

Defendants argue that Plaintiffs fail to present an actual case or controversy as required under Article III, Section 2 of the Constitution. Defendants claim that the matter is not ripe for adjudication. Defendants contend that Plaintiffs must submit an application to take the bar examination, be denied based solely on residency status, and exhaust available administrative review procedures before the matter would become ripe. As these steps have not all occurred, according to the Defendants, factual questions remain to be answered, and the Plaintiffs have not suffered actual harm.

Plaintiffs argue that the issues in the case are purely legal and, thus, fit for judicial determination. They argue that the Rule as interpreted by the Louisiana Supreme Court completely prohibits nonimmigrant aliens from becoming members of the bar.[10] Both Plaintiffs have been told by the Committee that their applications to take the bar examination will be denied because they are nonimmigrant aliens. Therefore, Plaintiffs allege that no

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[10] *See In re Bourke,* 819 So.2d at 1022 (establishing that the term "resident alien" in rule XVII applies only to permanent resident aliens and overruling inconsistent prior holdings); *Leclerc,* at 797, 801 (finding that the Louisiana Supreme Court did not violate the Fourteenth Amendment rights of the plaintiffs by prohibiting nonpermanent resident aliens from being admitted to the Louisiana State Bar).

further factual development is required and that the issues presented to the Court are purely legal. Additionally, the Plaintiffs claim that they want to become members of the Louisiana Bar, intend to do so if permitted, and are suffering actual, not speculative, hardship because they cannot proceed with their bar applications.

On facts very similar to this case, Judge Zainey, in a thorough and well-crafted opinion, recently found that the *Leclerc* plaintiffs presented claims that were ripe for judicial determination. *Leclerc*, at 788. The same reasoning applies in this case. Plaintiff Wallace submitted an application for an equivalency determination (the first step in applying to the take the bar examination) and was told by the Committee that she was ineligible to take the examination because she is a nonpermanent resident alien. Plaintiff Maw submitted either an application for admission to the bar based on reciprocity or an application to take the bar examination and was similarly told that she was ineligible because she is a nonpermanent resident alien. Thus, as in *Leclerc*, the Committee enforced the prohibition contained in the Rule against the Plaintiffs. There is no reason to believe that the Louisiana Supreme Court would have accepted the Plaintiffs' applications to take the bar examination. To do so, it would have to contravene its own interpretation of "resident alien" in *Bourke*. Therefore, the only remaining issues in the case are legal and an actual controversy exists between the parties. Accordingly, Plaintiffs' claims are ripe for adjudication.

2. Standing

The "constitutional minimum of standing" requires three elements: (1) "injury in facta harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical"; (2) "causationa fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3)

"redressability--a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). A plaintiff generally may not seek redress for injuries done to others, but must submit to the challenged policy. *Ellison v. Connor,* 153 F.3d 247, 254-55 (5th Cir.1998) (*quoting Jackson-Bey v. Hanslmaier,* 115 F.3d 1091, 1096 (2d Cir.1997)). The Fifth Circuit, however, excuses this threshold requirement for standing where the plaintiff shows that submission to the policy would have been futile. *Id.* (*citing Jackson-Bey,* 115 F.3d at 1096).

Defendants argue that the Plaintiffs lack standing to bring the suit because they seek redress for a purported injury that has not occurred and that may never occur. The Plaintiffs argue that the Rule is an absolute prohibition and that there is no doubt that any further effort to gain admission to the bar will be futile due to their nonimmigrant status. Plaintiffs further claim that the prohibition is causing them present, concrete injury by not allowing them to become members of the bar.

Again applying and agreeing with the court's opinion in *Leclerc,* this Court finds that the Plaintiffs have standing to bring the suit. Plaintiffs have been told that they are ineligible to take the bar examination. They have no reason to believe that their respective applications to take the bar examination would be accepted. On the contrary, the Committee would, without a doubt, reject their applications due to their nonimmigrant status. Thus, the Plaintiffs' injury is concrete, and they have standing.

In sum, Defendant's motion to dismiss based on Plaintiff's failure to establish a justiciable case or controversy is hereby DENIED.

C. Abstention

Defendants argue that this Court should abstain from hearing the matter pursuant to *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).[11] Defendants claim that an adequate state court review is available and that the state law issues are a matter of substantial public interest. Specifically, the public has an interest in how the Louisiana Supreme Court regulates lawyers and the practice of law. As the Louisiana Supreme Court has particular knowledge, expertise, and familiarities with the policies at issue, Defendants urge the Court to abstain from hearing the matter.

Plaintiffs argue that abstention is not warranted because the case does not present any disputed or difficult questions of state law. According to Plaintiffs, the rule is clear, and they are asking the Court to determine if the Rule violates the Constitution.

As in *Leclerc*, the Court is not persuaded that Plaintiffs present questions of difficult state law such that abstention is warranted. While the suit involves questions of substantial public interest, the claims are based solely on federal law.

Accordingly, the Court declines to exercise its discretion to abstain from this matter.

D. Eleventh Amendment Immunity

Defendants allege that all of the Plaintiffs' claims, excluding their equal protection claims,[12] are barred by

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[11] The *Burford* doctrine provides that a federal court should not exercise its jurisdiction when the case raises difficult questions of state law. *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

[12] Defendants acknowledge that the Eleventh Amendment does not bar the Plaintiff's equal protection claims.

the Eleventh Amendment.[13] Defendants allege that the Plaintiffs sued the Justices and Bar Admissions Officials in their official capacities thereby making the state a party in interest. Plaintiffs argue that their claims fit squarely within the *Ex Parte Young*[14] exception to Eleventh Amendment immunity because they seek prospective declaratory and injunctive relief against state officials alleged to be acting in violation of the Constitution.

The Court agrees with Plaintiffs and finds that the *Ex Parte Young* exception is applicable in this case, and, thus, Defendants are not entitled to immunity under the Eleventh Amendment. Accordingly, the Defendants' motion to dismiss based on Eleventh Amendment immunity is DENIED.

E. Absolute Immunity

Defendants assert that they are absolutely immune from the instant suit based on the doctrines of judicial and legislative immunity. The Court will address the applicability of each doctrine in turn.

1. Judicial Immunity

Defendants claim that they are absolutely immune from suit pursuant to the doctrine of judicial immunity.[15]

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[13] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[14] 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The *Ex Parte Young* doctrine allows declaratory or prospective injunctive relief against state officials acting in violation of federal law. Cox v. City of Dallas, 256 F.3d 281, 307 (5th Cir.2001).

[15] *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (finding that public officials like judges and (...continued)

Judicial immunity applies, according to Defendants, because actions taken in regulating lawyers and the practice of law are judicial in nature.[16]

Plaintiffs argue that judicial immunity does not apply. Specifically, Plaintiffs note that the Supreme Court has found that the administration of bar matters requires judges to act in three capacities: executive, legislative, and judicial. *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980).[17] According to Plaintiffs, the Defendants are acting in their executive capacity because they are

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prosecutors are absolutely immune from claims based on actions taken in their official capacities); *Stump v. Sparkman*, 435 U.S. 349, 355, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (finding judicial immunity to be "a general principle of the highest importance to the proper administration of justice").

Defendants claim that judicial immunity has been enlarged pursuant to the Federal Courts Improvement Act of 1996. Defendants note particularly that the FCIA amended 42 U.S.C. § 1983 to provide that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."

[16] Defendants argue that the doctrine applies to the Justices because, in promulgating rules for lawyers, they are acting in their judicial capacity. Moreover, Defendants claim that the doctrine applies to the Bar Admissions officials because the immunity bars suits against officials acting in quasi-judicial roles. *Samuel v. Michaud*, 980 F.Supp. 1381, 1415-16 (D.Idaho 1996) ("State bar association committee members policing the legal profession are entitled to absolute quasi-judicial immunity for their actions.").

[17] First, judges act in a judicial capacity when determining the fitness of individual applicants. Second, judges act in a legislative capacity when promulgating bar rules. Third, judges act in an executive capacity when enforcing those rules. *Consumers Union*, 446 U.S. at 734, 100 S.Ct. 1967.

implementing and enforcing the Rule thereby disqualifying them from judicial immunity.

As in *Leclerc*, the Court finds that Defendants act in their executive capacity when they enforce bar rules. Both the general doctrine of judicial immunity and the Federal Courts Improvement Act of 1996 apply to actions taken by judicial officers in their judicial capacity. Thus, the FCIA is inapplicable here and the doctrine of judicial immunity does not bar the Plaintiffs' suit.

Accordingly, Defendants motion to dismiss based on judicial immunity is DENIED.

2. Legislative Immunity

Defendants also claim that they are entitled to absolute legislative immunity. Similar to judicial immunity, officials enjoy absolute immunity from suit for actions taken in their legislative capacity.[18] Defendants claim that legislative immunity applies because the Plaintiffs ask them to modify the current rule and create a different bar admission rule.[19]

Plaintiffs re-assert that they are suing Defendants in their executive capacity as enforcers of bar admission rules.

Plaintiffs are making a facial challenge to the constitutionality of the Rule. They seek to enjoin the Defendants from enforcing the Rule. As such, the

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[18] *See Consumers Union*, 446 U.S. at 730-34, 100 S.Ct. 1967 (finding that Justices of a state supreme court are protected by legislative immunity from claims against them for their role in promulgating the rules governing the practice of law).

[19] *See Lewis v. Louisiana State Bar Ass'n*, 792 F.2d 493, 497 (5th Cir.1986) (finding that the Louisiana Supreme Court "occupies the same position as that of the [Louisiana] legislature" when exercising its rule-making authority over bar matters).

Plaintiffs' claims are not aimed at the authority of the Defendants to *promulgate* rules pursuant to their legislative capacity, but, rather, at their authority to *enforce* the rules pursuant to their executive capacity. Thus, legislative immunity is inapplicable, and the Defendants motion to dismiss based on legislative immunity is DENIED.

III. Plaintiff's Motion for Summary Judgment

Plaintiffs argue that they are entitled to summary judgment on their claims for declaratory relief as a matter of law. They claim that there are no genuine issues of material fact in this case because they are attacking the facial unconstitutionality of the Rule and its blanket preclusion of all nonimmigrant aliens from admission to the bar. Thus, Plaintiffs claim that there is no reasonable basis for disputing the material facts as to the nature and application of the Rule.[20]

A. Legal Standards

In determining whether a party is entitled to summary judgment, the court views the evidence in the light most favorable to the non-moving party. *Littlefield v. Forney Indep. School Dist.*, 268 F.3d 275, 282 (5th Cir.2001) (citing *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir.2001)). Summary judgment will be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. Fed. R. Civ.P. 56. If the moving party fails to meet its initial burden of demonstrating the absence of a genuine

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[20] Defendants did not file a cross motion for summary judgment, but, rather, a motion to dismiss. Thus, Defendant's arguments in opposition are taken from their motion to dismiss. (Rec.Doc. No. 15).

issue of material fact, the motion for summary judgment must be denied, regardless of the nonmovant's response. *Little v. Liquid Air Corp.* 37 F.3d 1069, 1075 (5 th Cir.1994) (*citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). However, if the party moving for summary judgment demonstrates the absence of a genuine issue of material fact "the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Willis v. Roche Biomedical Laboratories, Inc.,* 61 F.3d 313, 315 (5th Cir.1995). "[A] dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* If the evidence leads to only one reasonable conclusion, summary judgment is proper. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Constitutional Claims

The Louisiana Supreme Court has plenary power to define and regulate all aspects of the practice of law, including admission of attorneys to the bar. *Dodson v. Spiliada Mar. Corp.,* 951 F.2d 40, 43 (5th Cir.1992). States may properly exercise this power by imposing high standards of qualification before they admit an applicant to the bar. *Schware v. Board of Bar Examiners of State of New Mexico,* 353 U.S. 232, 238-39, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957). However, a state supreme court may not exercise this power in a manner that contravenes the Due Process or Equal Protection clauses of the Fourteenth Amendment. *Id.* Thus, any qualification for admission to the bar must bear a rational relationship to the fitness and capacity of the applicant to practice law. *Id.*

1. Federal Preemption Claim

Plaintiffs argue that Congress has established a comprehensive statutory scheme to govern the treatment of aliens in the United States and that the Rule is thereby

preempted by federal immigration law. They note that state law is preempted by federal law not only when there is a direct conflict between the two laws, but also when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The Supremacy Clause prevents states from enacting regulations that discriminate against lawfully admitted aliens by placing burdens on them not permitted by Congress.[21] Plaintiffs allege that Defendants are placing an additional burden on their rights that is in conflict with federal immigration law. Specifically, Plaintiffs argue that Congress regulates the employment opportunities of nonimmigrant aliens.[22] Federal law allows a state to have licensing requirements to practice certain professions, but contains no provision permitting the states to bar an alien's opportunity to practice his profession. Thus, Plaintiffs contend that it is within Congress's power to determine whether nonimmigrant aliens should be allowed to practice law.

Defendants state that the Rule is not in actual conflict with federal immigration law. Additionally, they note that a state provision enacted to protect the public health and safety should be upheld unless there is evidence of Congress's clear and manifest purpose of displacing the state's exercise of its police power. *New York State Soc. of Orthopaedic Surgeons, Inc., v. Gould* 796 F.Supp. 67, 72 (E.D.N.Y.1992). Defendants contend

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[21] *See, Takahashi v. Fish and Game Commission*, 334 U.S. 410, 416, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948) (striking down state law prohibiting a certain class of aliens from obtaining a commercial fishing license).

[22] *See* 8 U.S.C. § 1101(a)(15) (describing various employment related and other classifications under which aliens may be lawfully admitted into the United States on a non-permanent basis).

that Plaintiffs fail to identify any federal statute that is in conflict with the Rule.

This Court finds that the Rule is not preempted by federal law. In *Leclerc*, the court correctly found that the Rule does not intrude on Congress's power to control immigration and admittance into the United States. *Leclerc*, at 802. This Court finds that the reasoning applied in *Leclerc* applies to the instant case as well.

Accordingly, Plaintiffs' motion for summary judgment on the issue of federal preemption is hereby DENIED.

2. Equal Protection Claim

Plaintiffs contend that the Rule unconstitutionally discriminates between citizens and immigrant aliens on the one hand, and nonimmigrant aliens on the other. According to Plaintiffs, there is no meaningful distinction between immigrant and nonimmigrant aliens who are lawfully residing in the United States vis-àvis their respective abilities to practice law. Thus, Plaintiffs argue, the exclusion of one class of resident aliens is arbitrary and has nothing to do with the fitness and capacity of such aliens to practice law.

As the classification is based on alienage, Plaintiffs claim that the proper level of scrutiny for the Court to apply in its analysis of the Rule is strict scrutiny.[23] Plaintiffs urge the Court to follow *In re Griffiths*, 413 U.S. 717, 722, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), wherein the Supreme Court applied strict scrutiny to a Connecticut bar admissions rule permitting only United

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[23] The Supreme Court has held that classifications based on alienage are inherently suspect and subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372-73, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971).

States citizens admission to the bar. The *Griffiths* Court implied that the legal distinction between "resident aliens" and citizens was largely semantic and in no way justified a wholesale ban on the admission of noncitizen, resident aliens to the bar. Though the *Griffiths* Plaintiff was an immigrant alien,[24] Plaintiffs in this case, nonimmigrant aliens, argue that Griffiths is controlling because the Court did not suggest that the holding applied only to immigrant aliens. Though Plaintiffs urge the Court to apply strict scrutiny, they argue alternatively that the Rule can not even withstand scrutiny under the rational basis standard.

Defendants argue that Plaintiffs fail to state a cognizable constitutional claim because there is no fundamental right for a non-lawyer to practice law.[25] As such, Defendants claim that the Louisiana Supreme Court is properly acting pursuant to its plenary power to regulate the practice of law by excluding persons with nonimmigrant visas from admission to the bar.

Though based on alienage, the Defendants allege that the Rule should not be analyzed under strict scrutiny because the Supreme Court has never held that nonimmigrant resident aliens are a suspect class. Rather, the Defendants urge the Court to analyze the Rule under the rational basis standard. Defendants claim that there

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[24] The Plaintiff in *Griffiths* was a citizen of the Netherlands and originally came to the United States in 1965 as a visitor. *Griffiths*, 413 U.S. at 718, 93 S.Ct. 2851. She thereafter married a United States citizen, thereby qualifying for permanent residence. *Id.* Though she was eligible for naturalization, she chose not to renounce her Dutch citizenship. *Id.*

[25] Though Defendants state this proposition correctly, the Court notes that once a state establishes a bar and a bar examination, it must permit admission in a manner consistent with the Fourteenth Amendment.

is a meaningful difference between citizens and immigrant aliens on the one hand and nonimmigrant aliens on the other. This meaningful difference, according to Defendants, is the temporary nature of Plaintiffs' residence in the United States. Thus, the Defendants ask this Court to distinguish the instant matter from the facts in *Griffiths* based on the different type of immigration status of the respective Plaintiffs. Defendants argue that the state's decision not to admit nonimmigrant aliens to the bar is a valid and legitimate exercise of the state's public safety and police powers when analyzed under the rational basis standard.

One need not dig deeply to discover the important contributions immigrants have made to our nation. Indeed, Louisiana, in no small part, owes its unique legal history to the influence and contribution of foreign legal systems and attorneys. Louisiana was claimed in the name of King Louis XIV of France in 1682 and remained under French rule until the territory was ceded to Spain in the Treaty of Fontainebleau in 1762.[26] Thereafter, Louisiana became a "Spanish ultramarine province," subject to the same laws as other Spanish possessions.[27] Pursuant to the Treaty of Ildefonso, Louisiana was returned to France in 1800 only to be sold to the United States in what became known as the Louisiana Purchase of 1803.[28] Thus, Louisiana law has its roots in foreign legal systems and codes such as las Sietes Partidas of Spain and the Napoleonic Code of France.

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[26] Alain A. Levasseur, *The Major Periods of Louisiana Legal History*, 41 Loy. L.Rev. 585, 585, 587 (1996).

[27] Raphael J. Rabalais, *The Influence of Spanish Laws and Treaties on the Jurisprudence of Louisiana: 1762-1828*, 42 La. L.Rev. 1485, 1487 (1982).

[28] Levasseur, *supra* note 25, at 593, 610-11.

Additionally, many foreign jurists contributed to the drafting and development of Louisiana's early legal system. For example, the Spanish Governor of Louisiana, Don Alexander O'Reilly, issued the Ordinance and Instructions of November 25, 1769, instituting the rule of Spanish law in the territory and influencing substantially the development of the Louisiana Procedural system.[29] Louis Moreau-Lislet, a French émigré, was one of the redactors of the Louisiana Digest of 1808 as well as the Louisiana Civil Code of 1825.[30] Judah P. Benjamin, born in the British West Indies in 1811, was one of the four founders of Tulane University School of Law and a United States Senator from Louisiana.[31] In addition to contributing to the formation and development of Louisiana's legal system, Louisiana jurists and scholars continue to rely on foreign sources, such as Aubry and Rau and Planiol, to interpret, particularly, the civilian aspects of our law. Thus, this Court is conscious of and sensitive to the historical and continuing debt Louisiana owes to foreign legal systems and members of foreign bars.

Though America is a nation of immigrants, our history is replete with discriminatory acts and policies against aliens. "Whether it is founded on economic protectionism, xenophobia, or other motivations, aliens frequently have been denied benefits and privileges accorded to citizens."[32] Despite the significant

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[29] A.N. Yiannopoulos, *The Civil Codes of Louisiana, in* La. Civ.Code Ann. XXXVI (West 2003).

[30] *Id.* at XXXVIII-XLIII.

[31] Suman Naresh, *Judah Philip Benjamin at the English Bar,* 70 Tul. L.Rev. 2487, 2487 (1996).

[32] Erwin Chermerinsky, Constitutional Law: Principles and Policies 614 (Aspen Law & Business 1997).

contribution immigrants have made and continue to make to our society, immigrants still experience prejudice and discrimination in the United States. The Supreme Court first addressed this discrimination in *Yick Wo v. Hopkins,* 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), wherein the Court found that aliens are "persons" guaranteed equal protection of the laws under the Fourteenth Amendment.[33] In 1971, the Supreme Court found that state classifications based on alienage are inherently suspect and subject to strict scrutiny review. *Graham,* 403 U.S. at 371, 91 S.Ct. 1848. The Court so found because aliens "as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate." *Id.* (*citing U.S. v. Carolene Products Co.,* 304 U.S. 144, 152- 53 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)). Aliens cannot vote and thus cannot protect themselves through the normal democratic process.[34] Therefore, laws that create classifications based on alienage are presumptively invalid, and the classification will be found to be constitutional only if the state can demonstrate that the law is the least restrictive means to achieve a compelling state interest. *In re Griffiths,* 413 U.S. at 721-22, 93 S.Ct. 2851. Laws subject to strict scrutiny review rarely survive attack. *Bernal v. Fainter,* 467 U.S. 216, 220 n. 6, 104 S.Ct. 2312, 81 L.Ed.2d 175 (1984).

Although strict scrutiny review is the general rule when states create classifications based on alienage, the

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[33] Indeed, the Court has recognized that even undocumented or illegal aliens are "persons" under the Fourteenth Amendment. *See Plyler v. Doe,* 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).

[34] *See* Gerald M. Rosberg, The Protection of Aliens from Discriminatory Treatment by the National Government, 1977 Sup.Ct. Rev. 275, 308-09 (arguing that classifications based on alienage should receive strict scrutiny due to the political powerlessness of aliens).

Supreme Court has created two important exceptions.[35] First, the Supreme Court recognizes a self-government exception that applies when a state creates a law excluding aliens from participation in its democratic political institutions. *Foley v. Connelie,* 435 U.S. 291, 295-96, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978). Only rational basis review is used under this exception. Thus, the Supreme Court has upheld state laws that deny aliens the right to vote and the opportunities to run for elective office, to sit on a jury, and to participate in other nonelective positions that contribute to the formulation, execution, or review of public policy. *Id. (internal citations omitted).* The Supreme Court declined to apply this exception to notaries public, however, explaining that the exception is narrow and addresses only those who "participate directly in the formulation, execution, or review of broad public policy, and hence perform functions that go to the heart of representative government." *Bernal,* 467 U.S. at 222, 104 S.Ct. 2312.

Second, the Supreme Court has recognized an exception to the application of strict scrutiny in one case concerning undocumented or illegal aliens. In *Plyler,* the Supreme Court declared unconstitutional a Texas Law that provided free public education for children of citizens and lawfully admitted aliens, but required undocumented aliens to pay for schooling for their children. *Plyler v. Doe,* 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The Court held that strict scrutiny was inapplicable because

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[35] The Court also recognizes a third exception when the discrimination is a result of federal law. Congress has plenary power to regulate immigration and requires judicial deference under the separation of powers doctrine. In such cases, the Court applies rational basis review. *See Mathews v. Diaz,* 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976) (upholding federal law denying Medicaid benefits to aliens unless they have been admitted for permanent residence and resided for at least five years in the United States).

illegal aliens cannot be treated as a suspect class. *Id.* at 223, 102 S.Ct. 2382. However, the Court applied more than rational basis review, emphasizing the innocence of the children involved and the importance that such children receive an education. *Id.* at 241, 102 S.Ct. 2382.

Defendants argue that this Court should recognize another exception to the general rule that strict scrutiny applies to state classifications based on alienage. Namely, Defendants contend that nonpermanent resident aliens, that is to say nonimmigrant aliens, are not a suspect class because the Supreme Court has never expressly stated that they are.[36] Defendants base their argument on the fact that the cases applying strict scrutiny to alienage classifications involve immigrant aliens. Thus, the first issue this Court must face is the appropriate level of scrutiny to apply to the Rule.

In *Griffiths,* the Court held that a Connecticut bar admissions rule that allowed only citizens to be admitted to the bar was unconstitutional. *In re Griffiths,* 413 U.S. at 722-23, 93 S.Ct. 2851. The Court held that the rule unconstitutionally discriminated against "resident aliens." *Id.* Defendants argue that since the Plaintiff in *Griffiths* was an *immigrant* alien, i.e., a permanent resident alien, that this Court should interpret the phrase "resident alien" used by the Supreme Court to mean only a *permanent* resident alien. This Court is not persuaded by Defendant's argument and finds that the Supreme

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[36] The Supreme Court has not spoken directly on the issue of the appropriate level of scrutiny to apply to nonimmigrant, resident aliens. Lower courts have held both ways. *See Leclerc,* at 799-800 (applying rational basis review); *Ahmed v. Univ. of Toledo,* 664 F.Supp. 282 (N.D.Ohio 1986) (applying rational basis review); *Tayyari v. New Mexico State Univ.,* 495 F.Supp. 1365 (D.N.M.1980) (applying strict scrutiny).

Court did not limit its holding to immigrant aliens, that is to say, permanent resident aliens.

To understand the significance of the term "resident alien" used by the *Griffiths* Court, one must begin with the Immigration and Nationality Act ("the Act"). 8 U.S.C. § 1101, *et seq.* For immigration purposes, Congress created two broad categories of resident aliens: immigrant and nonimmigrant. Simply stated, immigrant aliens are aliens who are granted permanent residence in the United States. § 1101(a)(15). Nonimmigrant aliens are aliens who are granted temporary residence in the United States for a number of specific reasons including business, pleasure, and educational. § 1101(a)(15)(A-S). The Act defines "residence" to mean "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." § 1101(a)(33). Thus, Congress distinguished between residence and immigration status. That is, an alien who resides in the United States may be either an immigrant or nonimmigrant alien. Had Congress intended that only immigrant aliens could have a residence in the United States, Congress would have so stated.

Though Griffiths was an immigrant alien, the *Griffiths* Court did not use the statutory term "immigrant" in its holding. In fact, the Court only briefly mentioned the Plaintiff's immigration status in its recitation of the facts and in a footnote. *In re Griffiths*, 413 U.S. at 718, n. 1, 93 S.Ct. 2851. Rather, the Court used the inclusive term "resident alien." Had the Court intended to rest its holding on the immigration status of the alien, the Court would have used the statutory language. If the Court wished to restrict its holding to immigrant aliens, i.e., permanent resident aliens, it could have used the term "immigrant alien." The Court did not. Rather, in the context of its Fourteenth Amendment analysis, the Court focused on residence, using the term

"resident alien," which includes both immigrant and nonimmigrant aliens. The Court reasoned that resident aliens are a suspect class and subject to the protections afforded by strict scrutiny review. The Court justified its application of strict scrutiny by noting:

> Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

Id. at 722, 93 S.Ct. 2851. Nothing in the Act or the Court's opinion suggests that "resident alien" is limited to an immigrant alien. On the contrary, the term "resident alien" is broader than the Act's immigration categories and includes both immigrant and nonimmigrant aliens lawfully residing in the United States.[37] Additionally, the justification for applying strict scrutiny to immigrant resident aliens applies as forcefully to nonimmigrant resident aliens. Like immigrant aliens, nonimmigrant aliens "pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *Id.* This Court finds that *Griffiths* is controlling and, thus, strict scrutiny is applicable. Nonimmigrant resident aliens as a class are a "prime example of a 'discrete and insular' minority for whom such heightened

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[37] This Court acknowledges that its application of strict scrutiny in this case is in conflict with the level of scrutiny applied in *Leclerc*. In *Leclerc*, Judge Zainey applied rational basis review because he found that the Supreme Court had not yet treated nonimmigrant aliens as a suspect class. 270 F.Supp.2d at 799, 800. In his opinion, Judge Zainey stated that the Supreme Court declined the opportunity to do so in *Toll v. Moreno*, 458 U.S. 1, 102 S.Ct. 2977, 73 L.Ed.2d 563 (1982). The *Toll* majority, however, decided the case on preemption grounds and did not reach the equal protection question. Moreover, the facts surrounding the plaintiffs' immigration status in *Leclerc* were different from the present case.

judicial solicitude is appropriate." *Id.* (*citing Carolene Products,* 304 U.S. at 152-53 n. 4, 58 S.Ct. 778). Therefore, similar to *Griffiths,* the Defendants bear a heavy burden when they deprive nonimmigrant resident aliens the opportunity to be admitted to the Louisiana bar.

To satisfy strict scrutiny review in this case, Defendants must show that the Rule is the least restrictive means to meet a compelling state interest. Defendants argue that the Louisiana Supreme Court properly promulgated and enforced the Rule pursuant to its legitimate and appropriate interests in protecting the public and policing attorneys. Defendants argue that a sufficient state interest is served by excluding nonimmigrant aliens due to the temporary and transient nature of their residency in Louisiana. According to Defendants, Plaintiffs' temporary residence could potentially prejudice clients and the courts in Louisiana because they could leave the country before completion of a matter. The Court finds that the Rule is not calculated to achieve this purpose.

The Rule does not restrict membership to the bar to citizens and immigrant aliens who plan to reside permanently in Louisiana. Nonimmigrant aliens as a class are not necessarily more transient than other groups. Citizens and immigrant aliens may be admitted to the bar even if they have no intention of residing in Louisiana. Louisiana attorneys relocate to other states and maintain bar membership in states where they do not reside. Due to advances in technology, attorneys can provide services and representation to clients from virtually anywhere. Louisiana attorneys retire, die, and leave the practice for a myriad of reasons. If the Louisiana Supreme Court were concerned with transience, the Rule would be calculated to address that problem directly. However, the Rule only excludes a fraction of persons who may have temporary residence in

the state. The fact that the Plaintiffs *must* leave on a date certain does not change the analysis. On the contrary, it might be an advantage. Plaintiffs will be able to plan in advance for their departure and make the necessary arrangements to protect the interests of their clients.

The Defendants have not provided a compelling reason for the absolute prohibition of nonimmigrant aliens from the bar. As such, this Court finds that the Rule as enforced by the Louisiana Supreme Court violates the Equal Protection Clause of the Fourteenth Amendment by arbitrarily discriminating against nonimmigrant aliens who lawfully reside in the United States.

All applicants to the bar, including nonimmigrant aliens, must meet rigorous standards for admission. Particularly, all applicants are screened to ensure that they meet the requirements of good moral character and fitness. The screening process provides adequate protection to the public against potentially unscrupulous and unqualified attorneys. Barring nonimmigrant aliens does not enhance this protection. On the contrary, such a bar could result in depriving the public of excellent legal representation.

Thus, Plaintiffs' motion for summary judgment declaring Louisiana Supreme Court Rule XVII, Section 3(B) in violation of the Equal Protection Clause of the Fourteenth Amendment is GRANTED, and the Rule is unenforceable to the extent that it bars these nonpermanent resident aliens from sitting for the Louisiana Bar Examination and from membership to the Louisiana Bar Association.[38]

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[38] Plaintiffs have also asked for an injunction as well as for attorney's fees and costs. These matters should be dealt with in subsequent motions and may require an evidentiary hearing before the Court.

Plaintiffs claim that the Rule also violates the Due Process Clause of the Fourteenth Amendment. It is well established that courts should avoid addressing constitutional questions when possible, even those questions that are raised by the parties. *United States v. Lipscomb,* 299 F.3d 303, 359 (5th Cir.2002). As the Court resolves Plaintiffs' claims on equal protection grounds, the Court need not reach the Plaintiffs' due process challenge.

The Plaintiffs' motion for summary judgment on the due process issue is hereby DENIED AS MOOT.

Accordingly:

IT IS ORDERED that Defendants' Motion to Dismiss should be and is hereby DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED IN PART, GRANTED IN PART, AND DENIED AS MOOT IN PART as detailed in this Order and Reasons.

FIFTH CIRCUIT DENIAL
OF PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-30752

KAREN LECLERC; GUILLAUME JARRY;
BEATRICE BOULORD; MAUREEN D. AFFLECK,

Plaintiffs - Appellants - Cross Appellees,

versus

DANIEL E. WEBB, ET AL.,

Defendants,

DANIEL E. WEBB; HARRY J. PHILLIPS, In Their Respective Official Capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions; JEFFERY P. VICTORY; JEANNETTE THERIOT KNOLL; CHET D. TRAYLOR; CATHERINE D. KIMBALL, a/k/a Kitty Kimball; JOHN L. WEIMER; BERNETTE JOSHUA JOHNSON, In Their Official Capacities as Justices of the Louisiana Supreme Court,

Defendants - Appellees - Cross Appellants.

****

No. 03-31009

CAROLINE WALLACE; EMILY MAW,

Plaintiffs - Appellees,

versus

PASCAL F. CALOGERO JR., in his official capacity as Chief Justice of the Louisiana Supreme Court; JEFFREY P. VICTORY; JEANNETTE THERIOT KNOLL; CHET D. TRAYLOR; CATHERINE D. KIMBALL; JOHN L. WEIMER; BERNETTE J. JOHNSON, in their official capacities as Justices of the Louisiana Supreme Court; DANIEL E. WEBB; HARRY J. PHILLIPS, JR., in their respective official capacities as Chairman and Vice-Chairman of the Louisiana Committee on Bar Admissions,

Defendants - Appellants.

Appeal from the United States District Court for the Eastern District of Louisiana,

ON PETITION FOR REHEARING EN BANC
(Opinion 8/18/05, 5th Cir. 419 F.3d 405)

Before JONES, Chief Judge, and SMITH, and STEWART, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and who are not disqualified not having voted in favor (FED.R. APP. P. and 5TH CIR. R. 35), the petition for rehearing en banc is **DENIED**.

Patrick E. Higginbotham, Circuit Judge, joined by KING, DAVIS, WIENER, BENAVIDES, STEWART, and DENNIS, Circuit Judges, dissenting from the denial of rehearing en banc.

I respectfully dissent from the Court's refusal to consider en banc the important issues in this case. The panel majority rejects strict scrutiny on the basis that these "nonimmigrant aliens," whatever that means, are not as "discrete and insular" as the "permanent resident aliens" afforded suspect classification by the Supreme Court. It reaches that result by judicially crafting a subset of aliens, scaled by how it perceives the aliens' proximity to citizenship. This is a bold step not sanctioned by Supreme Court precedent.

For decades, many have argued that it is the classification of aliens as an insular minority that is suspect. The criticism comes in two forms. To some, the unique federal interest in regulating aliens offers a superior rationale for strict scrutiny than the aliens' insular status. As the Supreme Court has recognized, "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal government."[39]

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[39] *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (holding that the Supreme Court has "long recognized the (...continued)

To others, the insular status of aliens exists only as a consequence of valid federal law, making strict scrutiny of alienage classifications never appropriate. This contention strikes twice. First, it contends that the alien's limited political role cannot support their treatment as an insular minority. This, because the very admission of the alien is by legislation that defines his role in the political community, subject only to constitutional constraints upon the exercise of that federal power. Second and relatedly, given the supreme federal regulatory power over matters of immigration, the status of persons admitted in conformity with federal law is by definition not immutable. To the point, this criticism is leveled at the claimed insular minority status of *all* aliens lawfully in the country. It draws no distinction between a particular alien's connection to citizenship or subsets of lawfully admitted persons. Rather, it rejects strict scrutiny without regard to the aliens' proximity to citizenship, the relevant factor for discrete and insular minority status under *Carolene Products*.

Resting strict scrutiny on the insular minority status of legally admitted aliens has its weaknesses. But none support the panel opinion and, in any event, each has been rejected by the Supreme Court. As for the trumping constitutional power of the federal government in controlling the nation's borders, including matters of immigration and naturalization, an allocation that the Supreme Court has pointed to as itself demanding strict scrutiny of state regulations of persons whose presence in the country is lawful under federal law, the panel majority is silent—a silence made the more puzzling by its rationale that this "category" of alien has such a

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preeminent role of the Federal Government with respect to the regulation of aliens within our borders" and collecting cases to that effect).

limited tenure in the United States under the conditions of federal law admitting them that their state regulation should not be subjected to strict scrutiny. This is exactly backwards. As the federal constraints are increased, the regulatory field for states is decreased.[40] As the federal judiciary draws distinctions between different classes of aliens, applying strict scrutiny to some and rational-basis review to others, it shifts responsibility over aliens from the Congress to the States. This is perverse. The panel majority relaxes scrutiny of state regulation of aliens as the federal regulation of them is increased. This is too ambitious for me.

CARL E. STEWART, Circuit Judge, with whom KING, HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges, join dissenting from the denial of rehearing en banc.

I dissent from the court's denial of rehearing en banc in this case involving the rights of alien law school graduates to be admitted to practice law in the State of Louisiana. For the reasons more fully detailed in my dissenting opinion from the panel majority's holding,[41] I reject the panel majority's creation of a new classification of "nonimmigrant aliens," a distinction the Supreme

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[40] *Mathews*, 426 U.S. at 81; see also *Graham v. Richardson*, 403 U.S. 365, 378 (1971) ("[States] . . . can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States . . . . State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." (quoting *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 417 (1948))).

[41] *LeClerc v. Webb*, 419 F.3d 405, 426-31 (Stewart, J., concurring in part and dissenting in part).

Court has never drawn when discussing the alien suspect class, and its application of rational basis review to laws targeting this class. The matter at issue is clearly enbancworthy because of the far reaching consequences of the panel's holding. I continue to maintain that the plaintiffs in this case, who are lawfully admitted aliens residing in the United States, are part of the alien suspect class and that, therefore, laws that discriminate against them are inherently suspect and should be subjected to strict scrutiny. Accordingly, I dissent from the full court's failure to vacate the panel opinion and hear the case anew. Moreover, I fully concur in the persuasive opinion dissenting from the denial of rehearing en banc penned by Judge Higginbotham.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI: This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. XIV: No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

8 U.S.C. § 1101(a)(3): The term "alien" means any person not a citizen or national of the United States.

8 U.S.C. § 1101(a)(15): The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens–**(F)(i)** an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study ... at an established college, university, seminary, conservatory, academic high school, elementary school, or other academic institution or in a language training program in the United States ....

(H) an alien ... **(i)(b)** subject to section 1182(j)(2) of this title, who is coming temporarily to the United States to perform services ... in a specialty occupation described in section 1184(i)(1) of this title ... who meets the requirements for the occupation specified in section 1184(i)(2) of this title ... and with respect to whom the Secretary of Labor determines and certifies to the

Attorney General that the intending employer has filed with the Secretary an application under section 1182(n)(1) of this title;

8 U.S.C. § 1101(a)(32): The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

8 U.S.C. § 1101(a)(33): The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

8 U.S.C. § 1184(b): Every alien ... other than a nonimmigrant described in any provision of section 1101(a)(15)(H)(i) of this title except subclause (b1) of such section) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officers, at the time of application for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title.

8 U.S.C. § 1184(i): (1) ... [F]or purposes of section 1101(a)(15)(H)(i)(b) of this title ... the term "specialty occupation" means an occupation that requires-- **(A)** theoretical and practical application of a body of highly specialized knowledge, and **(B)** attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

(2) For purposes of section 1101(a)(15)(H)(i)(b) of this title, the requirements of this paragraph, with respect to a specialty occupation, are–(A) full state licensure to

practice in the occupation, if such licensure is required to practice in the occupation, (B) completion of the degree described in paragraph (1)(B) for the occupation, or (C)(i) experience in the specialty equivalent to the completion of such degree, and (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty ....

8 C.F.R. § 214.2(h)(4)(ii): Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to ... law ... and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

(6)

Supreme Court, U.S.
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JUL 27 2006
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Nos. 05-1645 & 06-11

In the Supreme Court of the United States

05-1645

CAROLINE WALLACE and EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., et al.,
Respondents.

06-11

KAREN LECLERC, et al.,
Petitioners,

v.

DANIEL E. WEBB, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Constitution requires the States to license as attorneys non-immigrant aliens holding short-term visas.

2. Whether the Supremacy Clause of the Constitution preempts the authority of the States to control and to regulate the practice of law in their jurisdictions.

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STATEMENT OF THE CASE

The appeal that the Fifth Circuit consolidated involves two lawsuits from the United States District Court for the Eastern District of Louisiana.[1] The petitioners in those cases assert that Rule XVII of Louisiana's Rules governing Admission to the Bar of the State of Louisiana (the "Bar Admission Rules") violates the Equal Protection Clause and the Supremacy Clause of the Constitution of the United States.

The petitioners in the *Wallace* Action allege that they are citizens of the United Kingdom living in the United States pursuant to short-term or "temporary" visas. At the time they filed their complaint, Ms. Maw alleged she was admitted to the United States under an F1 student visa and Ms. Wallace asserted that she held an H-1B visa. Ms. Wallace states that she works as a paralegal in Louisiana. She further contends that in June of 2002 she understood that the Supreme Court of Louisiana and/or the Bar Admissions Officials granted her application to take Louisiana's bar examination. She, however, states that she received no "written confirmation" to that effect. Ms. Maw alleges that Louisiana's bar denied her application due to her temporary visa status. Neither Ms. Wallace nor Ms. Maw contend that they appealed to the Supreme Court of Louisiana the alleged adverse determinations of their applications.

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[1] They are *LeClerc, et al. v. Webb, et al.*, No. 03-664A (the "*LeClerc* Action") and *Wallace, et al. v. Calogero, et al.*, No. 03-1245L (the "*Wallace* Action"). The respondents submit this opposition to the petition filed by the plaintiffs in the *Wallace* Action and to the petition filed by the plaintiffs in the *LeClerc* Action, which have been consolidated by this Court.

The petitioners in the *LeClerc* Action allege that they are foreign nationals in the United States under J, F and L visas. Those visas permit "temporary" admission to the United States. Ms. LeClerc, Mr. Jarry and Ms. Boulord assert that they are citizens of France. While they seek admission to Louisiana's bar, they did not allege that they applied to take Louisiana's bar examination before filing their complaint in the district court. Ms. Affleck alleges that she is a citizen of Canada and that she obtained admission to the United States pursuant to an L-2 spousal visa. She avers that she holds a law degree from a university in Canada. Ms. Affleck asserts that she sought from Louisiana's bar an education equivalency determination and that the Committee on Bar Admissions denied her application because she is not an immigrant alien. Ms. Affleck does not allege that she appealed to the Supreme Court of Louisiana per the Bar Admission Rules.

The respondents are the Chief Justice[2] and Associate Justices of the Supreme Court of Louisiana (the "Justices"). The petitioners sued the Justices in their official capacities. The petitioners also sued Messrs. Webb and Philips in their official capacities as Chairman and Vice-Chairman of Louisiana's Committee on Bar Admissions (the "Bar Admissions Officials").

The Constitution of Louisiana grants the Justices the exclusive authority to promulgate and to interpret the Bar Admission Rules. The Justices hear and decide appeals of decisions concerning applications to Louisiana's bar.[3] The

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[2] Chief Justice Pascal F. Calogero is not a respondent in the *LeClerc* Action. He is a respondent in the *Wallace* Action.

[3] Bar Admission Rules, Rule XVII § 9.

Bar Admissions Officials administer the Bar Admission Rules pursuant to a specific grant of authority from the Supreme Court of Louisiana.[4]

SUMMARY OF ARGUMENT

This Court has never held that the Constitution requires a State to license as an attorney a nonimmigrant alien. This Court has never held that the laws of the States that simply affect the holders of temporary visas are subject to the standard of strict scrutiny review. The majority of the Panel of the Fifth Circuit correctly rejected the petitioners' contentions. The Fifth Circuit rightly denied en banc consideration of the case.

The petitioners propose that this Court expand the Equal Protection Clause of the Constitution to compel the Supreme Court of Louisiana to permit them to apply for law licenses in the State of Louisiana. The jurisprudence of the Court does not support the petitioners' request. Louisiana -- like the many other States that have similar statutes, rules and regulations that affect nonimmigrant aliens -- is entitled to decide whether to offer short-term visa holders the privilege of practicing law that it offers citizens and immigrant aliens. Rule XVII of the Bar Admissions Rules does not burden a fundamental right or target a suspect class. The Fifth Circuit's decision does not conflict with this Court's precedents or the jurisprudence of the other Circuits. Rule XVII does not offend the Equal Protection Clause of the Constitution.

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[4] Bar Admission Rules, Rule XVII § 1.

Additionally, Rule XVII is consistent with the Supremacy Clause of the Constitution. The Bar Admission Rules reflect Louisiana's proper exercise of its police power. The Congress has not preempted attorney licensing, regulation, discipline or oversight. Moreover, the petitioners do not identify any conflict between the Bar Admission Rules and the laws of the United States.

REASONS FOR DENYING THE PETITIONS

A. The Bar Admission Rules are Consistent with the Equal Protection Clause of the Constitution.

The petitioners' situations are both factually and legally distinct from those of immigrant aliens and citizens. Those distinctions doom their claims.

The petitioners in the *LeClerc* Action and in the *Wallace* Action are citizens of France, Canada and the United Kingdom. They are nonimmigrant aliens in the United States under short-term or "temporary" visas.[5] In short, the petitioners are nonresident aliens.[6] The petitioners allege that

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[5] At the time they filed suit, Ms. Maw held an F1 student visa and Ms. Wallace had an H-1B visa (for persons "temporarily" in the United States). 8 U.S.C. § 1101(a)(15) (F) & (H); 8 C.F.R. § 214.2(h). In the *LeClerc* Action, Ms. LeClerc, Mr. Jarry and Ms. Boulord held "J" visas. Ms. Affleck had an L-2 visa. Like "F" and "H" visas, "J" and "L" visas are "temporary" visas.

[6] The petitioners now describe themselves as "nonpermanent resident aliens," presumably to liken themselves to the plaintiff in *In re Griffiths*, 413 U.S. 717 (1973). That creative self-description lacks foundation. This Court has described short-term visa holders (like the petitioners) as "nonimmigrant" or "nonresident aliens."

they hold licenses to practice law in other nations and/or are graduates of foreign law schools.

According to the terms of their respective visas, the petitioners represent that they have residences in foreign countries that they have "no intention of abandoning." 8 U.S.C. §§ 1101(a)(15)(F), (H) & (J). The visas that the petitioners hold impose upon them specific terms and

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E.g., *Nyquist v. Mauclet*, 432 U.S. 1, 4 (1977) (reasoning that because the challenged statute did not apply to nonimmigrant aliens, "such as those here on [F] student visas," the law was "of practical significance only to resident aliens."). The Circuit Courts use the same identification. *E.g.*, *Ahmed v. Univ. of Toledo*, 822 F.2d 26, 26 (6th Cir. 1987) (describing as "nonresident aliens" international students living in the United States under student visas). Similarly, federal statutes and regulations generally describe visa holders as "nonresident aliens." *E.g.*, 26 U.S.C. § 7701(b)(3); 26 C.F.R. § 1.1441-1(c)(3)(ii); 26 C.F.R. § 301.7701(b)-1. While the petitioners live in the United States for a short time, their *foreign residences* -- that they affirm they have "no intention of abandoning"-- places them in the category of nonresident aliens. The district court in the *LeClerc* Action correctly characterized the petitioners as "nonimmigrant" or "nonresident aliens." Indeed, in their filings in the district court, the petitioners in the *LeClerc* Action accurately described themselves as "nonresident aliens." The website of the United States Citizenship and Immigration Services defines "Resident Alien" as applying to three alien categories, *none of which include nonimmigrant aliens like the petitioners*. *See* http://uscis.gov/graphics/glossary.htm (defining "Resident Alien" as permanent resident aliens, conditional [permanent resident] aliens and returning [permanent] resident aliens). The petitioners are *not* resident aliens.

requirements.[7] A violation of the terms of the visas makes the nonimmigrant alien deportable.[8] In addition, other circumstances beyond a visa holder's control -- including loss of employment or enrollment in an educational program -- requires a nonresident alien promptly to depart the United States.[9] The petitioners' visas are "temporary" by design and definition.[10]

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[7] *See* 8 U.S.C. § 1101(a)(15); 8 CFR § 241.2.

[8] 8 U.S.C. §§ 1184 & 1227. *See Omagah v. Ashcroft*, 288 F.3d 254, 257-58 (5th Cir. 2002) (recognizing the discretion of the Attorney General in the procedures of deportation); *Khano v. I.N.S.*, 999 F.2d 1203, 1207 (7th Cir. 1993) (observing that Section 241(a)(9) of the Act empowers the INS, on behalf of the Attorney General, to deport those nonimmigrants who fail to maintain the conditions attached to their nonimmigrant status while in the United States).

[9] 8 C.F.R. § 214.1(a)(3) (requiring nonimmigrant visa holders to depart the United States at the end of their visa's "period of admission" or the end of their compliance with the visa's terms); 8 C.F.R. § 214.2 (setting forth requirements and terms of F, H, J and L nonimmigrant visas).

With regard to the persons that hold visas that permit them to work, when the nonimmigrant alien's employment ends through termination, lay-off or his/her employer's bankruptcy, the visa holder must promptly depart the United States. Indeed, because work visas are position/employer-specific, the holder of this visa has a precarious attachment to a specific job and lacks the employment mobility that citizens and immigrant aliens enjoy.

[10] 8 U.S.C. §§ 1101(a)(15)(F), (H), (J) & (L).

Unlike the petitioners, immigrant aliens have rights and responsibilities very similar to those of citizens of the United States. The government may not deport immigrant aliens. They have the right to reside in the United States on a permanent basis. 8 U.S.C. § 1101(a)(20). In addition, they may serve in the military[11] and persons may not discriminate against them in employment.[12] Immigrant aliens enjoy entitlements to public welfare benefits.[13] They pay taxes on the same basis as citizens.[14] The United States may conscript them.[15]

In contrast, visa holders, as nonimmigrant aliens, have far fewer rights and responsibilities than citizens or immigrant aliens. For example, short-term visa holders do not pay taxes

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[11] 10 U.S.C. § 504.

[12] 8 U.S.C. § 1324b(a)(3).

[13] *See Graham v. Richardson*, 403 U.S. 365 (1971). Unlike citizens, however, immigrant aliens may not vote, hold public office or engage in certain occupations. *See Foley v. Connelie*, 435 U.S. 291 (1978) (the exclusion of resident aliens from the state police does not offend the Equal Protection Clause); *Ambach v. Norwick*, 441 U.S. 68 (upholding New York's law that barred from certification school teachers that are not citizens); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (The Equal Protection Clause does not prohibit California from excluding immigrant aliens from employment as probation officers).

[14] Resident or immigrant aliens pay taxes on income from all sources within or outside the United States. *See* IRS Publication 519, U.S. Tax Guide for Aliens, Chapter 2, p. 11 (2005).

[15] 50 App. U.S.C. § 453.

like citizens or resident aliens[16] and the United States may not conscript them into military service.[17] Temporary visa holders, as nonimmigrant aliens, do *not* enjoy the same rights as citizens and immigrant aliens. For example, they may not enlist in the military.[18] They have strict limitations on their ability to work in the United States[19] and they have no entitlement to public welfare benefits. While the Congress has protected immigrant or resident aliens from discrimination in employment, it generally has not extended those protections to visa holders or other nonimmigrant aliens.[20] Further, nonimmigrant aliens have fewer opportunities to own real estate in the United States[21] and do not possess the right to remain permanently in the United States.[22] In sum, visa

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[16] Under the federal tax code, nonimmigrant or "nonresident" aliens only pay taxes on the income that they receive from sources in the United States. *See* 26 U.S.C. § 1441; IRS Publication 519, U.S. Tax Guide for Aliens, Chapter 2, p. 11 (2005).

[17] 50 App. U.S.C. § 453.

[18] 10 U.S.C. § 504. At the time of the lower courts' rulings, 10 U.S.C. §§ 3253 & 8253 addressed this limitation.

[19] 8 C.F.R. § 214.2(j) & (f) (imposing restrictions and limitations on the ability of F1 and J visa holders to work while in the United States); 8 C.F.R. § 214.2(l) (declaring that L-2 visa holders may not accept employment "unless he or she has been granted employment authorization").

[20] 8 U.S.C. § 1324b(a)(3).

[21] 30 U.S.C. § 22. The States similarly place limits upon or prohibit altogether ownership of real estate by nonimmigrant aliens.

[22] 8 U.S.C. § 1101(a)(20).

holders remain in the United States at the discretion of the Attorney General.[23]

The States, like the federal government, may afford nonimmigrant aliens rights distinctly different from those granted citizens and resident aliens. For example, certain of the States prohibit altogether or place limits upon the ability of nonimmigrant aliens to own real estate.[24] Certain of the States provide unemployment compensation benefits to citizens and immigrant aliens but not to visa holders.[25] Certain of the States allow citizens and resident aliens -- but not visa holders -- to attend public universities on a tuition-free basis.[26] Certain of the States offer only citizens and resident aliens -- but not visa holders -- licenses to practice

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[23] 8 U.S.C. § 1184.

[24] *E.g.*, IA. Stat. Ann. § 9I.1 (prohibiting visa holders and other nonimmigrant aliens from purchasing or otherwise acquiring agricultural land within Iowa's borders). Should a person's status change to that of a nonresident alien, he/she is required to divest him or herself of all rights, title and interest in the real property. IA. Stat. Ann. § 9I.6.

[25] *See Zapata v. Levine*, 50 A.D.2d 681, 682 (N.Y. App. Div. 1975); *Duenas-Rodriguez v. Indus. Comm'n*, 606 P.2d 437, 438 n.3 (Colo. 1980) (citing Colo. Rev. Stat. § 8-73-107(7)). The court in *Duenas-Rodriguez* observed that the "courts have consistently held that aliens who enter the United States on nonimmigrant visas and aliens who enter illegally have no constitutional right to work." *Id.* at 439 (citations omitted).

[26] *See Carlson v. Reed*, 249 F.3d 876, 883 (9th Cir. 2001) (rejecting an equal protection challenge to California's rule that grants only immigrant aliens and citizens admission tuition-free to California's universities).

medicine and dentistry.[27] In addition, the States that adopt the federal income tax scheme treat temporary visa holders differently from citizens and resident aliens in tax matters.

Like the Congress and the legislatures of the States, the Court has recognized the basic distinctions among immigrant aliens and other groups of aliens, including visa holders. In *Mathews v. Diaz*, 426 U.S. 67, 78 (1976), the Court observed that, although all persons enjoy the protections of the Constitution, that "does not lead to the further conclusion that all aliens are entitled to enjoy all of the advantages of citizenship."[28] Indeed, there is no basis for a "conclusion that all aliens must be placed in a single, homogeneous legal classification."[29] This Court further recognizes that the extent of an alien's "ties to this country" determines whether the government may treat a particular class of aliens more or less favorably than other categories of aliens.[30] In *Landon v. Plasencia*, 459 U.S. 21, 32 (1982), the Court noted that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his

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[27] *E.g.*, N.Y. Educ. Law § 6524 (applicant for New York physician's license must be a citizen "or an alien lawfully admitted for permanent residence in the United States"); La. R.S. 37:761(A)(1) (dental license applicant must be "a citizen or a permanent resident of the United States").

[28] 426 U. S. 67, 78 (1976).

[29] 426 U.S. at 78. Importantly, this Court made these pronouncements **after** it decided *In re Griffiths*, 413 U.S. 717 (1973). This Court has not indicated that *Griffiths* applies to nonresident aliens or that the States must accord nonresident aliens the same opportunities as resident or immigrant aliens.

[30] 426 U.S. at 79 n.13.

constitutional status changes accordingly." In *Foley v. Connelie*, 435 U.S. 291, 294 (1978), the Court remarked that "we have never suggested that [state legislation that imposes restraints on aliens] is inherently invalid, nor have we held that all limitations on aliens are suspect.").

The Circuits have described immigrant aliens as the "most favored category of aliens admitted to the United States."[31] And the Fifth Circuit aptly recognized the factual and legal distinctions that surround different groups of aliens and the nature of their respective ties to the United States. The petitioners are simply wrong in asserting that they are indistinguishable from immigrant aliens.

Strict scrutiny does not apply to the Bar Admission Rules. Under the precedents of this Court, the courts employ the measure of strict scrutiny only when the government has created classifications that burden a fundamental right[32] or that target a "suspect" class of persons.[33] The courts review all other classifications by the government pursuant to the rational basis standard -- with a "heavy presumption of

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[31] In *Kim v. Ziglar*, 276 F.3d 523, 528 (9th Cir. 2002), the Ninth Circuit commented that immigrant aliens "[u]nlike almost all other aliens" are entitled to apply for citizenship, to work in the United States "without limitation," and to reside permanently in the United States. (This Court reversed the Ninth Circuit's ruling, holding that the Due Process Clause does not forbid the detention of immigrant aliens without a bail hearing. *Demore v. Kim*, 538 U.S. 510 (2003).)

[32] The petitioners no longer contend that they have a fundamental right to practice law.

[33] *Heller v. Doe*, 509 U.S. 312, 319 (1993).

validity."[34] That heavy presumption of validity requires deference to Rule XVII because it neither burdens a fundamental right nor targets a suspect class.[35]

The Bar Admission Rules do not target a suspect class. As the Panel of the Fifth Circuit correctly observed, this Court has not held that nonimmigrant aliens constitute a suspect class. This Court has not ruled that the States must treat all aliens identically, without regard to their situations. Additionally, this Court has not decided that a classification by a State that affects only nonimmigrant aliens faces strict scrutiny by the judiciary. When this Court has reviewed a classification like the one in the Bar Admission Rules about which the petitioners complain, it has applied the rational basis level of review. *E.g., Terrace v. Thompson*, 263 U.S. 197 (1923) (ordinary review of a statute in Washington that prohibited aliens who have not expressed an intention to become citizens from owning real estate). That standard -- rather than strict scrutiny -- governs review of Rule XVII.

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[34] *Id.* at 319.

[35] While the rules of other States are not directly at issue, the respondents note that jurisdictions other than Louisiana have similar or identical bar admission requirements. For example, Rhode Island limits bar admission to citizens and resident aliens with a green card. New Hampshire limits bar admission to "domiciliaries of the United States." Temporary visas prevent nonimmigrant aliens from establishing a domicile in the United States. *See Carlson*, 249 F.3d at 880 (citing *Elkins v. Moreno*, 435 U.S. 647, 655 (1978)). The bar admission rules of those and other states – like Louisiana's Bar Admission Rules – are wholly consistent with *Griffiths* and the Equal Protection Clause.

The petitioners err in saying that the panel's decision conflicts with this Court's decision in *In re Griffiths*. That case arose in a very different factual and legal context. A Connecticut statute prohibited the plaintiff -- an immigrant alien married to a citizen and eligible for naturalization -- from admission to Connecticut's bar.[36] Connecticut's statute -- that permitted only citizens to obtain law licenses -- operated as a "total exclusion"[37] of "all aliens from the practice of law."[38] This Court invalidated Connecticut's "wholesale ban" on alien bar admission[39] after observing the significant similarities between citizens and resident aliens.[40] Those observations, including service in the Armed Forces, do *not* apply to short-term visa holders.

Neither the Bar Admission Rules nor the petitioners' situations bear significant similarity to the circumstances in *Griffiths*. The petitioners are not immigrant or resident aliens. They are in the United States pursuant to short-term visas. Rule XVII does not impose a "citizens-only" requirement and expressly permits immigrant aliens to obtain

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[36] 413 U.S. at 718.

[37] 413 U.S. at 719.

[38] 413 U. S. at 727.

[39] 413 U.S. at 725. Importantly, the Court discussed the oath that immigrant aliens take upon induction in the Armed Services. Visa holders, however, may not serve in the military. 10 U.S.C. § 504. The Court did not address the validity of a rule that applies only to nonimmigrant aliens.

[40] 413 U.S. at 722.

law licenses. Rule XVII is not a "wholesale ban" and does not "totally exclud[e] aliens from the practice of law."

The petitioners also overreach when they say that nothing in *Griffiths* suggests the decision is limited to the status of the plaintiff. That contention ignores the Court's holding, reasoning and terminology in *Griffiths*. This Court took pains to discuss the "wholesale ban" on alien admission in that case, which "totally excluded" all aliens from admission to the bar. Had the Court desired to address all groups of aliens, it would have described and discussed "aliens" generally – rather than "resident aliens."[41]

The similarities between citizens and immigrant aliens that this Court discussed in *Griffiths* – such as tax liability and military service – likewise distinguish nonimmigrant aliens from that decision's reasoning and holding. Resident or immigrant aliens have the same tax and selective service obligations as citizens. Nonimmigrant aliens do not. Immigrant aliens have the right to remain permanently in the United States. Nonimmigrant aliens do not. Nonimmigrant aliens are not like citizens and resident aliens in many other respects. *Griffiths* simply does not apply to short-term visa holders. Indeed, this Court's subsequent explanation of its decisions in *Griffiths* and *Graham* (as well as other opinions upon which the petitioners rely) confirms that the Court made its decisions on the principle that the state statutes at issue were "inconsistent with the congressional determination to

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[41] This Court employed the words "resident alien" throughout its opinion, particularly in its holding that the categorical exclusion in that case "unconstitutionally discriminates against resident aliens." 413 U.S. at 718. Without justification, the petitioners now seek to stretch the Court's opinion to include temporary visa holders.

admit the alien to *permanent residence*." *Foley v. Connelie*, 435 at 295 (emphasis added.) The United States has *not* granted the petitioners, as temporary visa holders, permanent residence.

The petitioners wrongly state that the Fifth Circuit's decision conflicts with the Fourth Circuit's opinion in *Moreno v. University of Maryland*, 645 F.2d 217 (1981) (per curiam). The panel's per curiam opinion in *Moreno* summarily affirmed the district court's ruling that the policy at issue, that concerned uniquely-situated G-4 visa holders, was constitutionally infirm for multiple reasons. *Id.* at 218 (noting that G-4 visa holders, "[u]nlike most nonimmigrant aliens," could reside permanently in the United States and could establish domicile in Maryland). This Court recognized the "significant" distinction between those plaintiffs and other categories of nonimmigrants. *Toll v. Moreno*, 458 U.S. 1, 14 & n. 20 (1982) (citing "significant" contrast between G-4 visas and F, H and other visas); *Moreno v. Toll*, 489 F.Supp. 658, 666 (D. Md. 1980) (noting "particular" circumstances of G-4 nonimmigrant aliens' ability to remain and establish domicile in the United States). On review, this Court did not address the contention under the Equal Protection Clause. *Toll*, 458 U.S. at 10.[42]

The petitioners fail to identify a conflict with the Fourth Circuit's per curiam decision in *Moreno*. The Fourth Circuit's ruling, unlike the thorough ruling by the Fifth Circuit, does not address the petitioners' dissimilar legal

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[42] Notably, this Court in *Plyler v. Doe* declined to apply the district court's rationale for its equal protection ruling: that a state statute affecting "only aliens" is subject to strict scrutiny, 457 U.S. 202, 223 (1982).

status or their temporary visas. There is no conflict and no basis for certiorari review.

Rule XVII does not apply to aliens as a class. The rule only affects aliens with temporary connections to Louisiana and to the United States.[43] This Court has never held that the courts must invoke strict scrutiny analysis to this sort of classification. The district court in the *LeClerc* Action and the Panel of the Fifth Circuit correctly recognized that.

The petitioners also wrongly place reliance upon *Graham v. Richardson*. The aliens in that case, like the plaintiff in *Griffiths*, were resident aliens.[44] The laws of Arizona denied public welfare benefits to resident aliens and other aliens "as a class."[45] This Court recognized that the statute denied aliens "the necessities of life, including food, clothing and shelter," and, therefore, denied entrance and abode to aliens

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[43] Though the respondents need not rely on this authority, it is worth noting that the Congress has authorized the States to decide the eligibility of various categories of aliens (except, in general, aliens admitted for permanent residence) for public benefits. 8 U.S.C. §1622. Among other things, public benefits include professional licenses. 8 U.S.C. §1621(c). The categories of excludable aliens include nonimmigrant aliens, like the petitioners. 8 U.S.C. §1622(a). The petitioners simply are wrong in arguing that the States have little or no power to classify among categories of aliens.

[44] 403 U.S. at 367.

[45] 403 U.S. at 371. *See Bernal v. Fainter*, 467 U.S. 216, 227 (1984) (striking down Texas' legislation that permitted only citizens to become notaries public because it imposed impermissible "wholesale ban" and "absolute and classwide exclusion" of all aliens, including the *immigrant alien* involved in the case).

who were "unable to live" without those basic necessities.[46] This Court struck down Arizona's citizens-only restriction.[47]

Rule XVII -- unlike the statutes in *Griffiths* and *Graham* -- does not impose a classwide exclusion of aliens. Rule XVII expressly permits immigrant aliens -- the most favored category of aliens -- to seek a license to practice law in Louisiana. Furthermore, Rule XVII does not deny aliens the basic necessities of life,[48] unlike the policies at issue in *Graham*, in *Plyler* and in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

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[46] 403 U.S. at 379-380. According to the petitioners' argument -- that *Griffiths* applies to nonimmigrant aliens -- *Graham* would likewise guarantee welfare benefits to immigrant *and* to nonimmigrant aliens. That, however, is not accurate. *E.g.*, *Soskin v. Reinertson*, 353 F.3d 1242, 1257 (10th Cir. 2004) (rejecting equal protection challenge to Colorado's limitation of Medicaid benefits to certain aliens but not to visa-holders). Long before the Congress recognized by statute the States' authority to offer benefits to certain sub-categories of aliens, the States exercised that authority. While the States may not deny welfare benefits to resident or immigrant aliens, the Constitution does not require the States to offer those benefits to persons, like the petitioners, in the United States pursuant to temporary nonimmigrant visas. Similarly, the Constitution does not require the States to grant law licenses to temporary visa holders.

[47] Again, this Court subsequently explained its reasoning and implicit rebuttal of petitioners' expansive reading of this Court's precedents: it was inconsistent to absolutely disallow employment opportunities or life's basic necessities to aliens who had been admitted for "permanent residence." *Foley*, 435 U.S. at 295.

[48] According to their allegations, Ms. Wallace and Ms. Maw currently work in the legal field.

The petitioners suggest that all persons extant in the United States are entitled to the same treatment, and that the States must afford all aliens the same opportunities. That is not (and never has been) the law. While the Fourteenth Amendment protects all persons in the United States, the Constitution does not guarantee identical treatment for all persons without regard to their situations. The petitioners propose an extraordinary expansion of constitutional law. That proposal has implications for a myriad of statutes, regulations and policies of the States.[49] *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting) (acknowledging that reluctance to enlarge the rights under the Equal Protection Clause flows, in part, from knowledge that each expansion results in invalidation of similar legislation).

Notably, the petitioners do not cite the Court to any decision of this Court that invokes the standard of strict scrutiny to a classification involving nonimmigrant aliens. Because the Bar Admission Rules do not infringe upon a fundamental right or target a suspect class, the Fifth Circuit correctly analyzed Rule XVII under the standard of rational basis review.

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[49] For instance, the Supreme Court of Louisiana may have to reevaluate its liberal policy of accepting applications from immigrant aliens that graduated from foreign law schools. In many jurisdictions, persons that graduated from foreign law schools may *not* seek a license to practice law. That is, in many jurisdictions bar applicants must graduate from ABA-approved law schools – all in the United States. In addition, state licensing and regulatory agencies – including state welfare and state homeland security departments – would face the impact of a ruling by the Court that the States may not treat short-term visa holders differently from citizens or immigrant aliens.

The Bar Admission Rules appropriately consider the petitioners' distinguishing characteristics: their transient status and inability to remain in this country indefinitely. As a matter of law, when a group possesses "distinguishing characteristics" relevant to interests under the State's authority to regulate, "a State's decision to act on the basis of those differences does not give rise to a constitutional violation." *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366-367 (2001) (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985)). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Garrett*, 531 U.S. at 367. Rule XVII merely differentiates between persons with different situations, as do other statutes of the Congress and the legislatures of the States that affect nonimmigrant aliens. It is due a "strong presumption of validity."[50] The petitioners' distinguishing characteristics – their decisions to dwell in the United States as temporary visa holders – dictate rational basis review.

The Equal Protection Clause does not serve as a "license for courts to judge the wisdom, fairness, or logic of legislative choices."[51] Under the traditional level of review, a statute in question "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[52] Importantly, the State need not "articulate at any time the

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[50] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

[51] 508 U.S. at 313.

[52] *Heller v. Doe*, 509 U.S. 312, 320 (1993).

purpose or rationale supporting its classification."[53] Furthermore, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."[54]

This Court has rejected equal protection challenges to legislation that advances some legitimate interest -- even when the law seems unwise or illogical, works to the disadvantage of a particular group or appears to have a tenuous rationale.[55] Moreover, a statute does not fail rational basis review merely because it "is not made with mathematical nicety or because in practice it results in some inequality."[56] Instead, the "classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[57]

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[53] *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992).

[54] *Beach Communications*, 508 U.S. at 315.

[55] *E.g., New Orleans v. Dukes*, 427 U.S. 297 (1976) (potential benefits to tourism justified classification favoring French Quarter pushcart vendors of certain longevity); *Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552 (1947) (possible efficiency and safety benefits of a closely knit pilotage system justified Louisiana's licensing scheme, which favored family and friends of current river boat pilots and disfavored unrelated persons).

[56] *Heller*, 509 U.S. at 321. This Court has warned that legislative choices are not "subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315.

[57] 509 U.S. at 320.

Rule XVII satisfies rational basis review. While the Justices are not obligated to articulate the purpose(s) or rationale(s) behind Rule XVII, the interests the Rule serves are plain: protection of the public, including the clients of Louisiana's attorneys. Louisiana's interests in regulating and policing licensed attorneys are legitimate, substantial and entirely appropriate.[58] Moreover, Louisiana's decision to offer bar admission to citizens and immigrant aliens – persons who have an expressed intent and *ability* to remain in the United States -- rationally relates to Louisiana's duty to monitor attorneys in Louisiana and, when necessary, to take action vis-à-vis the attorneys.[59] Contrary to the petitioners' assertions, there is nothing irrational about a decision not to grant law licenses to persons, unlike citizens and resident aliens, who exist in this country at the whim and discretion of

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[58] *See Southern Christian Leadership Conference v. Supreme Court of Louisiana*, 61 F. Supp.2d 499, 510 (E.D. La. 1999) (finding "legitimate" and "appropriate" the Supreme Court of Louisiana's concerns with client solicitation, the protection of the public and its ability to police licensed attorneys).

[59] The petitioners advance the flawed argument that their situations are no different than other persons who move to other States. But visa holders who leave the United States are beyond the reach of the judicial system. This is a very real concern for the defendants, the officials in Louisiana charged with overseeing the bar and deciding appropriate remedial action when clients or cases suffer as a result of neglect or malfeasance by an attorney. The petitioners' tenuous, temporary and conditional connection with the United States and the States, however, set them apart from the applicants who are immigrant aliens, as the appellate panel recognized.

others. The Supreme Court of Louisiana's system serves significant interests of the State of Louisiana.[60]

The Supreme Court of Louisiana is the sole authority over bar admission requirements, the ultimate adjudicator of attorney disciplinary complaints in Louisiana and the agency charged with remedying wrongs and omissions by Louisiana attorneys.[61] For example, when cases suffer from an attorney's neglect, ethical lapses or other problems, the Justices decide appropriate sanctions or other remedial action. The Justices should have the ability to determine whether transient persons should, in the interest of Louisiana's

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[60] Though the petitioners view Rule XVII as inefficient and question its design and effect, their disagreement does not make Rule XVII unconstitutional. *See Beach Communications*, 508 U.S. at 316 (the fact that a classification disadvantages some persons "or might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration") (citations omitted). This Court has cautioned against the judicial activism that the petitioners seek. *E.g., Heller*, 509 U.S. at 319 ("We many times have said, and but weeks ago repeated, that rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *See City of New Orleans*, 427 U.S. at 303 (explaining that "the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines").

[61] *See Dodson v. Spiliada Mar. Corp.*, 951 F.2d 40, 43 (5th Cir. 1992) (recognizing that the Supreme Court of Louisiana "has exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, the discipline, suspension and disbarment of lawyers, and the client-attorney relationship.").

citizenry, hold licenses to practice law. The Supreme Court of Louisiana legitimately may decide that persons on short-term visas -- whose presence in the United States is temporary, has no guarantee and is beyond their control -- should not hold licenses to practice law in Louisiana. Indeed, should the United States force a visa holder (through no fault of his or her own) to leave the United States suddenly, the Supreme Court of Louisiana will bear the responsibility of remedying any resulting problems.[62] Louisiana has a substantial interest in ensuring that it can effectively rectify harm done by attorneys licensed in Louisiana through restitution and/or discipline.

There is no question that the petitioners seek an expansion of the Equal Protection Clause and this Court's precedent, as the district court in the *LeClerc* Action and the Fifth Circuit recognized. Indeed, a myriad of similar state statutes, rules, regulations and policies counter the petitioners' arguments. The Fifth Circuit appropriately resisted the petitioners' invitation.

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[62] Pursuant to the Homeland Security Act, the Congress split the functions of the INS into three bureaus in the Department of Homeland Security. As a result, the status of visa holders is now even more tenuous: "It is clear that when security considerations arise, BICE (Bureau of Immigration and Customs Enforcement) monitoring will override BCIS (Bureau of Citizenship and Immigration Services) conferral of benefits with regard to nonimmigrants. Thus, a nonimmigrant who fails to report a change of address according to the rules within 10 days, would come under the jurisdiction of the BICE and could be removed and barred further entry by the BICE regardless of the benefits conferred by the BCIS." Austin T. Fragomen, Jr. & Steven C. Bell, *H-1B Handbook*, p. vii (2003).

The petitioners identify no conflict with the precedent of this Court, as the Fifth Circuit discussed in a thorough opinion. The petitioners offer no valid reason for the Court to grant their petitions.

B. The Bar Admission Rules are Consistent with the Supremacy Clause

The district courts and the Fifth Circuit rejected the petitioners' claims under the Supremacy Clause. The courts correctly ruled that Congress has not preempted attorney licensing, oversight and discipline and that the Bar Admission Rules do not conflict with the laws of the United States. The petitioners present no reason to revisit that conclusion.

The Supreme Court of Louisiana promulgates the Bar Admission Rules, including Rule XVII, through its constitutional responsibility to license, to oversee, and to discipline members of the bar. That is an area that Louisiana, like other States, historically has regulated.

The legislation of a State runs afoul of the Supremacy Clause when it intrudes upon an area that the Congress has expressly preempted.[63] When the Congress has not occupied a particular field, the laws of the United States may preempt the laws of a State when the law of a State "conflicts" with the laws of the United States.[64] The analysis under the Supremacy Clause, however, "starts with the basic

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[63] *See Hillsborough County, Fl. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

[64] *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989).

assumption that Congress did not intend to displace state law."[65]

When a law of a State arises in an area that the States have traditionally regulated, the courts grant the regulation or law deference.[66] Consequently, the courts do not supercede the historic police powers of the States unless that is the "clear and manifest purpose of Congress."[67]

As in many states, the Supreme Court of Louisiana has exclusive authority over attorney licensing, admission and discipline. Louisiana has important interests in protecting the public, in policing Louisiana's attorneys, and in promoting the integrity and the public perception of Louisiana's bar and the judicial system. In addition, Louisiana has substantial interests in ensuring that it can effectively rectify harms, through restitution and/or discipline, that attorneys licensed in Louisiana cause. Through the Bar Admission Rules, the

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[65] *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992). *See also ARC America Corp.*, 490 U.S. at 101 (a litigant that asserts preemption under the Supremacy Clause must overcome the presumption against preemption).

[66] *See Hillsborough County*, 471 U.S. at 715. *See also Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 687 (2d Cir. 1996) (observing that the presumption against preemption is "especially strong" in areas traditionally regulated by the States).

[67] *Cipollone*, 505 U.S. at 516; *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (the intent of Congress to supersede the laws of the States in areas traditionally occupied by the States must be "clear and manifest").

Supreme Court of Louisiana exercises the State's police power in the interests of public safety and protection.

The petitioners do not identify anything that suggests that the Congress intended to displace Louisiana's authority to make decisions about licensing legal professionals. The Fifth Circuit correctly recognized that. Indeed, the Immigration and Nationality Act specifically contemplates the States exercising their licensing functions.[68] The Congress has neither expressly nor impliedly superseded the role of the States in the area of bar admission -- and certainly has not done so with "clear and manifest intent."

Importantly, the petitioners do not point out any "actual conflict" between the Bar Admission Rules and the laws of the United States. That failure alone defeats their claim of preemption.

Even should a conflict exist, the Court should accord Bar Admission Rules substantial deference. They arise under Louisiana's police power and in an area that the State historically has regulated. Under this authority, many states decide to license only graduates of law schools in the United States or law schools approved by the American Bar Association.[69] The States make numerous other decisions

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[68] *E.g.*, 8 U.S.C. § 1184(i)(2)(A).

[69] Acceptance of the petitioners' argument under the Supremacy Clause would result in the courts striking the bar admission rules of many other states. Indeed, many states require ABA-approved legal educations as prerequisites to bar admission. That categorically excludes most or all of the petitioners, including Ms. Wallace notwithstanding her H visa, from bar admission in those states. Louisiana, however, considers foreign law school

concerning their licensing requirements. Those decisions – like Louisiana's decision to offer bar admission to graduates of foreign law schools but not to temporary inhabitants of the United States – are proper for the individual States to make. The Supreme Court of Louisiana has weighed competing considerations and made a sound decision regarding admissions to Louisiana's bar. Nothing in Rule XVII offends the Supremacy Clause.

The petitioners incorrectly assert that Rule XVII prevents H-1B visa holders from working in the legal field. Indeed, Ms. Wallace holds an H-1B visa and she works as a paralegal. The legal field includes a wide variety of work that does not require a license to practice law including work as a paralegal, factual or legal researcher, trial assistant and even work on pleadings and agreements that a licensed attorney submits.[70] By their own admissions, the petitioners are able to work within the legal community and the field of law.

The Fifth Circuit rightly followed this Court's decision in *DeCanas v. Bica*.[71] This Court in *DeCanas* reviewed a California statute that allowed employers to refuse to employ certain unlawful aliens when that employment had an adverse

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educations but offers bar admission to citizens and immigrant aliens – not temporary visa holders. Under the petitioners' argument, the rules of many other states conflict with federal law and are therefore unconstitutional.

[70] *See Southern Christian Leadership Conference*, 252 F.3d 781, 790 & n.6 (5th Cir. 2001).

[71] 424 U.S. 351 (1976). Tellingly, the plaintiffs in *DeCanas* did not assert a claim under the Equal Protection Clause.

effect on citizens and other aliens.[72] This Court reinforced that it had "never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."[73] This Court also cited the principle that the "States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."[74] Reasoning that the analysis focused on the state's traditional authority over and regulation of employment, not the federal government's authority over immigration, this Court *reversed* the appellate court's ruling that California's law was unconstitutional.[75]

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[72] 424 U.S. at 352-53.

[73] 424 U.S. at 355.

[74] 424 U.S. at 356. Among California's reasons for the burden on alien workers were increases in unemployment, negative effects on wages and working conditions, and diminished effectiveness of labor unions.

[75] In *Carlson v. Reed*, the Ninth Circuit rejected a Supremacy Clause challenge to a California policy precluding nonimmigrant visa holders from obtaining free public university educations to which citizens and immigrant aliens were entitled. *See* 249 F.3d at 877. The appellate court observed that unlike other California residents, the plaintiff was distinguished by the terms of her nonimmigrant visa, which "expressly conditioned admission . . . on an intent not to abandon a foreign residence or, by implication, on an intent not to seek domicile in the United States." *Id.* at 879 (citations omitted). The appellate court concluded that Congress, not California, imposed the burden on the plaintiff when it issued the nonimmigrant visa. *See id.* at 881. In this matter, the petitioners' temporary, conditional stay in this country is similarly due to the action of Congress' immigration scheme, not the respondents' classification.

Rule XVII does not conflict with federal law. The Supreme Court of Louisiana, like its counterparts in other states, historically has exercised its broad authority over the attorney-client relationship, the regulation of Louisiana attorneys, and the criteria for admission to Louisiana's bar. Simply because Louisiana's exercise of its police power may impact a subcategory of aliens is not a basis for invalidation of the Bar Admission Rules. The Fifth Circuit correctly recognized Louisiana's exercise of its authority as "unquestionably permissible."

CONCLUSION

Because the petitions present no valid basis for this Court to grant them, the Court should deny the petitions for certiorari.

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IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,

Petitioners

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Pursuant to this Court's Rule 15.8, Petitioners Caroline Wallace and Emily Maw submit this supplemental brief to respond to the Brief for the United States as *Amicus Curiae*. The government does not dispute that there is a conflict between the decision below and that of a state court of last resort, *Dingemans v. Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989), on the important issue of the preemptive effect of the Immigration and Nationality Act on state licensing regimes that discriminate against aliens. Amicus Br. at 7, 13-14. Instead, the government offers an assessment of the merits of the conflict that rests on an illogical premise and on a misinterpretation of this Court's decision in *Toll v. Moreno*, 458 U.S. 1 (1982).

The government also cannot refute that a conflict exists between the decision below and *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981) concerning the proper level of equal protection scrutiny to apply to state laws that discriminate against subclasses of aliens. Instead, the government relies on cases addressing issues *not* presented here: the *federal* government's authority to discriminate among aliens and the "political functions" exception to strict scrutiny.

There are real conflicts in the law regarding important issues of federal preemption and equal protection scrutiny. The Court should grant the petition for a writ of certiorari to address and resolve these conflicts.

I. The Court Should Resolve the Preemption Conflict.

The government does not dispute that there is a conflict with *Dingemans* on whether the Immigration and Nationality Act preempts state laws that prohibit holders of H-1B visas from becoming state bar members solely on the basis of their status as aliens. Instead, the government argues that the conflict should be ignored because the Supreme Court of Vermont "did not have the benefit of DHS's views in resolving the preemption question," and DHS is said to "interpret[] the federal scheme to allow each State to decide the extent to which" H-1B visaholders "will be eligible for bar membership." Amicus Br. at 12, 14. The argument is meritless.

In the first place, DHS has no apparent jurisdiction to confer on States an authority to discriminate against aliens or subclasses of aliens, and thus any pronouncements by it on this subject are not entitled to deference. The timing of DHS's interpretation also strips it of any deferential respect. *See United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (agency arguments advanced for the first time in litigation engender "near indifference"). *Cf. Medtronic v. Lohr*, 518 U.S. 470, 512 (2000) ("It is not certain that an agency regulation determining the preemptive effect of *any* federal statute is entitled to deference.") (O'Connor, J., concurring in part, dissenting in part).

Second, the asserted position of DHS is extreme and illogical. The government claims that since a state license is a precondition for an H-1B visa, Congress left to the States the right to preclude aliens from becoming eligible for licenses solely on the basis of their alien status. *See id.* at 8. Apparently, DHS would see no preemption problem if all 50 states decided not to allow any aliens to have licenses for any specialty occupations, notwithstanding that the Immigration and Nationality Act expressly provides for the admittance of aliens in such fields. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(B).

But why would a federal statute provide for visas that would never issue if States could prohibit persons from applying based solely on their status as aliens? It is absurd to interpret the federal statute that permits aliens to work as lawyers (or other licensed professions) as allowing the States to veto that decision by denying aliens the ability to seek a license in the first instance, solely on account of their alien status. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Congress cannot delegate to the States its plenary authority over immigration matters, U.S. Const. art. I, § 8, yet DHS's interpretation of the Act would make the States the decisionmakers on whether any H-1B visas can issue. The Supreme Court of Vermont's correct interpretation in *Dingemans* recognizes the federal preemption in this field. While States are free to set qualifications for licensure,[1] *Dingemans* simply holds that in doing so States cannot impose special burdens that would apply only to aliens because such barriers were not anticipated or contemplated by Congress in authorizing the admittance of aliens to practice in these fields. *See* 568 A.2d at 356.

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[1] The government argues that "Congress has not required States to make aliens eligible for a license so that they would then be eligible for H-1B status" and that Congress would not "seek to displace traditional state licensing authority." Amicus Br. at 9, 10. These statements misapprehend Petitioners' claim. Louisiana is not required to license Wallace or Maw to practice law because they are temporary visaholders; rather, Louisiana may not prevent them from becoming bar members solely because they happen to reside in the United States under a nonpermanent visa. Of course, in order to become bar members, Petitioners must meet the academic, character and fitness requirements set by the State. Thus, Maw has filed her equivalency paperwork and Wallace has taken and passed the Louisiana Bar exam.

A preemption holding would be consistent with the principles enunciated in *Toll*, which involved a state law that stood as an obstacle to the accomplishment of the full purposes and objectives of Congress as expressed in the Immigration Act's authorization of G-4 visas to World Bank employees. The Court held that the Act preempted Maryland's refusal to provide in-state tuition to the children of G-4 visaholders because this practice "frustrate[d] the federal policy" of admitting these aliens. 458 U.S. at 16. The Court held: "we cannot conclude that Congress ever contemplated that a State, in the operation of a university, might impose discriminatory tuition charges and fees solely on account of the federal immigration classification." *Id.* at 17. So too here: in authorizing H-1B visas, Congress could not have contemplated that States could render the availability of such visas illusory by refusing to let aliens apply for necessary licenses solely because they are aliens.

The government argues that the state law in *Toll* "directly conflicted with congressional judgments relating to the G-4 classification." Amicus Br. at 11. Petitioners agree. But the conflict in *Toll*—depriving the children of lawfully-admitted aliens the benefit of in-state tuition on account of their status as aliens—is no less "direct" than the conflict here. Federal law permits aliens to enter the country on nonpermanent visas to practice as lawyers; Louisiana would prohibit those visas from ever issuing "solely on the basis of the federal immigration classification." If anything, the conflict here is more "direct" than in *Toll*: Congress said nothing about in-state tuition, but it has spoken expressly regarding the practice of law by H-1B visaholders.

The state law here "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *De Canas v. Bicas*, 424 U.S. 351, 363 (1976) and imposes a "discriminatory burden[] upon the entrance or residence of aliens lawfully within the United States," *Takahashi v. Fish & Game Commission*, 334 U.S. 410, 419 (1948). It is therefore preempted by federal law.

II. The Court Should Resolve the Equal Protection Conflict.

The government does not refute Petitioners' showing that a conflict exists between the Fourth Circuit's decision in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981) and the decision of the Fifth Circuit in this case. Instead, the government argues that "it is unclear" whether the Fourth Circuit would consider itself "entirely bound" by its prior decision and then attempts to distinguish *Moreno* on the basis of the particular immigration classification at issue. *See* Amicus Br. at 19. Neither point has merit.

The Fourth Circuit cannot overrule a prior decision absent an en banc ruling or intervening Supreme Court precedent. *See McMellon v. United States*, 387 F.3d 329, 331-32 (4th Cir, 2004). *Moreno*'s adoption of the district court's application of strict scrutiny remains the law of the Fourth Circuit with respect to state law subclassifications based on alienage. *See* 645 F.2d at 220.

The government's attempt to distinguish *Moreno* because it involved G-4 visaholders as opposed to H-1B visaholders lacks merit. *See* Amicus Br. at 19. A classification is based on alienage regardless of how many or how few aliens fall within its scope. *See Nyquist v. Mauclet*, 432 U.S. 1, 19 (1977) ("The important points are that [the State law] is directed at aliens and only aliens are harmed by it."). An H-1B visaholder is not situated differently from a G-4 visaholder in terms of the "myriad other ways" each contributes to our society. *In re Griffiths*, 413 U.S. 717, 722 (1973). An H-1B visaholder can have "dual intent" and may seek permanent residence in the United States. *See* 22 C.F.R. § 41.11; 8 C.F.R. § 214.2(h)(16). And H-1B visaholders, unlike G-4 holders, pay federal and state income taxes. *See* 26 U.S.C. § 7701(b). There is no reason why the equal protection analysis should be less strict for the H-1B visaholders.

The government also argues that *Foley v. Connelie*, 435 U.S. 291 (1978) and *Mathews v. Diaz*, 426 U.S. 67 (1976) establish that strict scrutiny does not apply to all classifications based on alienage. *See* Amicus Br. at 15-16. But neither *Foley* nor *Mathews* is applicable here. This case does not involve a state law restricting employment in a political function, such as a police officer or government official; there is no reason to invoke the *Foley* exception to strict scrutiny.

This case also does not involve a challenge to a *federal* statute that discriminates on the basis of alienage, so reliance on *Mathews* is misplaced. The situation here involves a *State* depriving lawfully-admitted aliens of the equal protection of its laws, and the government can point to no authority other than the incorrect decision below that requires rational basis review in such circumstances.[2] The argument that the State's action has been "incorporated" into federal law (Amicus Br. at 18) and therefore is not subject to strict scrutiny is unsupported by any citations and is at odds with the undeniable fact that the discriminatory action in this case is solely that of the State of Louisiana, in which the federal government played no role at all.

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[2] The government argues that strict scrutiny is not appropriate because aliens residing abroad have "no ties to this country and no claim to equal treatment." Amicus Br. at 17. That statement is beside the point. Petitioners reside lawfully within the United States. The Fourteenth Amendment prohibits Louisiana from denying them "the equal protection of the laws." U.S. Const. amend XIV.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONERS

Respondents' brief erroneously asserts that there is no conflict between the Fifth Circuit's holding on the equal protection issue in this case and the Fourth Circuit's holding on the same issue in *Moreno v. University of Maryland*, 645 F.2d 217 (4th Cir. 1981), *aff'd sub nom., Toll v. Moreno*, 458 U.S. 1 (1982). The two courts resolved in diametrically opposite ways the question whether discriminations against nonpermanent resident aliens are subject to strict scrutiny under the Equal Protection Clause.

Respondents do not even attempt to dispute that there is a direct conflict between the Fifth Circuit's holding concerning the Supremacy Clause and the decision of the highest court of Vermont in *Dingemans v. Board of Bar Examiners*, 568 A.2d 354 (Vt. 1989). It is, moreover, apparent even from Respondents' brief that this case presents issues of great public and constitutional importance concerning whether states can discriminate against aliens lawfully present in the United States. The Court should grant the petition for a writ of certiorari.

I. THE EQUAL PROTECTION QUESTION SHOULD BE REVIEWED BY THIS COURT.

1. Respondents assert that the Fourth Circuit's holding in the *Moreno* case does not conflict with the Fifth Circuit's decision on the equal protection issue because the Fourth Circuit's *per curiam* decision did not contain a discussion of the issue. Opp. at 15-16. In fact, the Fourth Circuit was reviewing a detailed and thorough district court opinion that examined the very question at issue here—whether strict scrutiny should apply to state classifications that discriminate against nonpermanent resident aliens. 489 F. Supp. 658 (D. Md. 1980). The Fourth Circuit expressly adopted this holding as its own, by first noting with approval that the district court had

applied strict scrutiny, and then concluding that "[f]or reasons sufficiently stated in this opinion of the district court, we agree that the University's ... policy ... is invalid under the Constitution." 645 F.2d at 220.

Respondents' suggestion that *Moreno* is distinguishable because it involved "uniquely situated G-4 visaholders" (Opp. at 15) is likewise wrong. In fact, the district court in *Moreno* considered and rejected the same argument that Respondents advanced below; namely, that "the previous Supreme Court cases concerning discrimination against aliens in which a strict scrutiny test was applied all involved a statute or practice which allegedly discriminated against resident aliens (a term equated by the defendant with immigrant alien)." 489 F. Supp. at 660. Moreover, the supposedly "unique" character of the G-4 visaholder—the ability to have "dual intent" and thereby seek to reside permanently in the United States—is also true of H-1B visaholders like Petitioners, as explained in point 2 below.

2. The Fifth Circuit's decision to apply rational basis review also conflicts with this Court's decisions in *In re Griffiths*, 413 U.S. 717 (1973), *Graham v. Richardson*, 403 U.S. 365 (1971), and *Nyquist v. Mauclet*, 432 U.S. 1 (1977)—all of which adopted strict scrutiny review with respect to discriminations against aliens—for the reasons set forth in the Petition (at 5-11). Respondents' attempts to argue that there is no conflict with these decisions lack merit.

First, Respondents allege that H-1B visaholders (such as Petitioners) must have "no intention of abandoning" their foreign residences, and for this reason supposedly do not merit the strict scrutiny applied in *Griffiths*. Opp. at 5. This contention is wrong as a matter of federal immigration law: H-1B visas are "dual intent" visas; their holders may "lawfully seek to become a permanent resident of the United States." 8 C.F.R.

§ 214.2(h)(16)(i) (2006); *see also* 8 U.S.C. § 1101(a)(15)(M). This contention is also wrong as a matter of interpretation of the Court's jurisprudence: in *Griffiths* the Court specifically noted that Mrs. Griffiths had not renounced her Dutch citizenship. *See* 413 U.S. at 718 n.1.

Second, Respondents advance the flawed argument that the different "tax liability and military service" of temporary visaholders takes them outside of the Court's holding in *Griffiths* and its progeny. Opp. at 14. This argument is wrong as a matter of law because it fails to comprehend the basis for the application of strict scrutiny in the first instance: to protect "discrete and insular" minorities from discrimination on the basis of their status as such a minority. *See Graham*, 403 U.S. at 372 (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938)). The reason the Court applied strict scrutiny in *Griffiths* was not because Mrs. Griffiths would be likely to serve in the military, but because she and other aliens were members of a powerless minority, easily subject to discrimination. Nonpermanent resident aliens are, if anything, even more powerless, and thus at even greater risk of discrimination, than are permanent visaholding aliens.

Respondents' argument is also wrong as a matter of fact because nonpermanent visaholders like Petitioners *do* pay taxes (both state and federal) and *can* enlist or be conscripted into the military. *See* 26 U.S.C. § 7701 (nonpermanent visaholders pay federal income taxes when they have "substantial presence" in the United States); La. Rev. Stat. Ann. 47:31(1) (requiring all persons "present in the state for more than six months in any given year" to pay state income tax); 10 U.S.C. § 504(b)(2) (granting the Secretary of Defense power to authorize the enlistment of temporary visaholders).

It is evident that nonpermanent visaholders, including Petitioners, contribute in a myriad of ways to our society; these contributions cannot be shunted aside or

ignored by labeling them "temporary" or "tenuous." Ms. Maw has lived in Louisiana since 1999 and her current visa does not expire until March 2009. Ms. Wallace arrived in New Orleans in 2002 and her current visa runs through 2007.* The fact that both Petitioners have remained in New Orleans after Hurricane Katrina, and continue to seek to assist indigent criminal defendants, eloquently demonstrates that they "contribute in myriad other ways to our society" such that state classifications discriminating against them solely on the basis of their status as aliens should be analyzed under strict scrutiny. *In re Griffiths*, 413 U.S. at 722.

3. Respondents contend that "[t]his Court has never held that the Constitution requires a State to license as an attorney a nonimmigrant alien." Opp. at 3. Of course, that is not the relief Petitioners seek: they will qualify for a license to practice law based on their academic records and the bar examination, as well as on their moral character and fitness. Here, they seek only the ability to have their credentials weighed along with all other applicants to the Louisiana Bar, and not to be summarily excluded on the basis of their status as aliens.

4. Respondents' justification for precluding nonpermanent residents from bar membership is so speculative and airy that they do not even contend that it would satisfy the strict scrutiny test or *any* form of heightened scrutiny. They hypothesize that Petitioners and other nonpermanent aliens might leave the country and be "beyond the reach of the judicial system," and that a sudden departure might prejudice the judicial process Opp. at 21 n.59, 23. This fear is not supported by reference to any actual experience in Louisiana, which until recent

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* Ms. Wallace recently married a U.S. citizen and is in the process of applying for permanent residency—a process that can take a year or more to complete.

years permitted nonpermanent visaholding aliens to be members of the bar, nor in any of the other states where such aliens are members of the bar. The fact is that nonpermanent visaholders do not pose realistic practical problems. Any lawyer, whether citizen or alien, may leave the state or the profession for any number of reasons, and there is no reason to think that Petitioners or other visaholders (who can become members of the bar only by demonstrating good character) will be disruptive or will fail to make adequate arrangements for clients if and when they leave the state. Moreover, even if they leave, the bar would retain the right to take disciplinarian measures, including disbarment if that were appropriate.

5. The equal protection question presented by this petition has divided the Fourth and Fifth Circuits, and sharply divided even the Fifth Circuit itself, as evidenced by the fact that the panel decision was 2-1 and that seven of the fifteen judges in the circuit voted to rehear the panel's decision in order to reverse it. The Court should grant the petition to resolve the conflict.

II. THE PREEMPTION QUESTION SHOULD BE REVIEWED BY THIS COURT.

1. Respondents do not address at all the Supreme Court of Vermont's decision in *Dingemans*, which invalidated a state bar rule, like the Louisiana Rule at issue here, that categorically prohibited an H-1B visaholder from becoming a member of the bar under the Supremacy Clause because the rule "impose[d] a burden on the federal immigration program that could not have been intended by Congress." 568 A.2d at 357 (citation omitted). There is a direct conflict between this decision and the Fifth Circuit's holding below; the Court should grant certiorari to resolve it.

2. Respondents contend that "petitioners do not point out any 'actual conflict' between the Bar Admission Rules and the laws of the United States." Opp. at 26. As

Dingemans held, however, the conflict arises because the federal law that permits aliens to seek and attain H-1B visas to engage in the practice of law necessarily contemplates that state governing authorities will not categorically prevent them from obtaining the requisite license. *See* 568 A.2d at 356-57.

3. Respondents also posit that there is no Supremacy Clause problem because petitioners can work in the "legal field" even though they cannot obtain a license to practice law. Opp. at 27. That statement is akin to an argument that the petitioner in *Takahashi* could have worked in the "fishing field" by piloting a boat, even though he was not allowed to fish, and that therefore the state law prohibiting him from obtaining a fishing license on the basis of his alien status was not preempted by federal immigration law. Of course, this Court did not so hold in invalidating that comparably discriminatory measure under the Supremacy Clause. *See Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) (emphasizing the "tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants ... from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization").

4. Respondents also argue that licensure of attorneys is traditionally a function left to the states, but the argument has no relevance here. States unquestionably possess wide authority to regulate lawyers, but the issue here is not the nature or scope of the regulation, but rather whether the state can impose special restrictions on lawful resident aliens that are not imposed on citizens.

III. THIS CASE PRESENTS IMPORTANT PUBLIC AND CONSTITUTIONAL QUESTIONS.

Although Petitioners and Respondents disagree as to the appropriate outcome of this case, it is clear that the constitutional questions presented herein are of great importance and are not limited in scope to the particular wording of Louisiana Bar Rule 3(B). As Respondents point out, other States could discriminate against nonpermanent visaholders with respect to bar admissions and other licensing regimes if the decision below is permitted to stand. *See, e.g.*, Opp. at 12 n.35, 17 n.46, 18 n.49, 26 n.69. The fact that the decision below will have "far reaching consequences," App. 78a, for future application of both the Equal Protection and Supremacy Clauses—as further discussed in the *amici* briefs—is an additional consideration militating in favor of granting the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

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KAREN LECLERC, ET AL., PETITIONERS

v.

DANIEL E. WEBB, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a state bar rule that allows citizens and permanent resident aliens to become members of the bar, but that precludes aliens who are not permanent residents from becoming members, is preempted by federal immigration law.

2. Whether that state rule violates the Equal Protection Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

No. 05-1645

CAROLINE WALLACE AND EMILY MAW, PETITIONERS

v.

PASCAL F. CALOGERO, JR., CHIEF JUSTICE, SUPREME COURT OF LOUISIANA, ET AL.

No. 06-11

KAREN LECLERC, ET AL., PETITIONERS

v.

DANIEL E. WEBB, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the decision below is correct and does not warrant the Court's review.

STATEMENT

1. The Immigration and Nationality Act distinguishes between immigrant and nonimmigrant aliens. Immigrant aliens have been "lawfully accorded the privilege of residing permanently in the United States," 8 U.S.C. 1101(20), and are not legally restricted in the activities they may pursue. Nonimmigrant aliens are granted temporary admission to the

United States for specific purposes. 8 U.S.C. 1101(a)(15) (2000 & Supp. IV 2004). Nonimmigrant aliens must abide by the conditions of their admission and stay as determined by the Secretary of Homeland Security. 8 U.S.C. 1184(a)(1); 8 C.F.R. 214.1(a)(3)(i).

a. An H-1B nonimmigrant is an alien who has come "temporarily" to the United States "to perform services" in, *inter alia*, a "specialty occupation." 8 U.S.C. 1101(a)(15)(H)(i)(B) (Supp. IV 2004). For an alien to obtain H-1B status, a prospective employer must file a petition with the Department of Homeland Security (DHS) on the alien's behalf. 8 C.F.R. 214.2(h)(1)(i) and (2). The application must establish that the alien possesses the minimum requirements necessary to be engaged in a speciality occupation and that the position the alien intends to fill is a speciality occupation. *Ibid.* The practice of law can qualify as a "specialty occupation." 8 C.F.R. 214.2(h)(4)(ii). If a state license is required to practice the speciality occupation, the alien must obtain such a license before seeking classification in that occupation. 8 U.S.C. 1184(i)(2)(A); 8 C.F.R. 214.2(h)(4)(v)(A). The petitioner must also obtain a certification from the Department of Labor on wages and working conditions, and that certification must be submitted together with an H-1B petition. 8 C.F.R. 214.2 (h)(4)(i)(B)(*2*).

If DHS approves the employer's petition, an alien may then apply for an H-1B visa. If the alien is abroad, that application may be made at the consular post. 8 C.F.R. 214.2(h)(2)(iv). The alien must satisfy the consular officer that he or she is admissible to this country and otherwise meets the requirements for the issuance of a visa. If issued an H-1B visa, the alien must then apply to DHS for admission at a port-of-entry, and DHS will then specify the terms and conditions of admission. *Ibid.* If the alien is already in the United States in a lawful nonimmigrant status, DHS "may,"

subject to certain exceptions, authorize a change from that nonimmigrant status to another, including H-1B status. 8 U.S.C. 1258; 8 C.F.R. Pt. 248.

An alien who has obtained H-1B status "may be employed only by the [employer] through whom the status was obtained." 8 C.F.R. 274a.12(b)(9). An approved H-1B petition may be valid for up to three years, 8 C.F.R. 214.2(h)(9)(iii)(A)(*1*). Ordinarily, an "alien's total period of stay may not exceed six years." 8 C.F.R. 214.2(h)(15)(ii)(B)(*1*).

b. The J-1 exchange visitor visa may be granted to an alien "having a residence in a foreign country which he has no intention of abandoning * * * who is coming temporarily to the United States as a participant in a program * * * for the purpose of," *inter alia*, "studying." 8 U.S.C. 1101(a)(15)(J). Aliens admitted to the United States in J-1 status may work only when such activities are part of the specific exchange program in which they are participating. 22 C.F.R. 62.16(a).

c. An L-1 nonimmigrant is an alien who has worked abroad "in a capacity that is managerial, executive, or involves specialized knowledge" and who has transferred temporarily to the United States to work in a similar capacity for the same employer or a qualifying subsidiary or affiliate. 8 U.S.C. 1101(a)(15)(L) (Supp. IV 2004). An employee who is transferred to work as a manager or executive may remain in the United States in L-1B status for a maximum of seven years, while an alien who is transferred to the United States to work in a specialized knowledge capacity may remain in the United States in L-1B status for a maximum of five years. 8 C.F.R. 214.2(*l*)(15)(ii). An alien who attains L-1 status "may be employed only by the [employer] through whom the status was obtained." 8 C.F.R. 274a.12(b)(12). An L-2 visa may be issued to the spouse or a child of a person who has attained L-1 status. 8 U.S.C. 1101(a)(15)(L) (Supp. IV 2004). Spouses and children who are admitted in L-2 status are "subject to the

same period of admission and limits" as the person in L-1 status. 8 C.F.R. 214.2(*l*)(7)(ii). "Neither the spouse nor any child may work unless he or she has been granted employment authorization." *Ibid.* The statute directs DHS to authorize the alien spouse to engage in employment in the United States and to issue the spouse an "appropriate work permit," 8 U.S.C. 1184(c)(2)(E) (Supp. IV 2004), but it does not require that the spouse be authorized to work in any particular occupation.

2. Supreme Court of Louisiana Rule XVII, Section 3(B) limits admission to the Louisiana Bar to citizens of the United States and resident aliens. For purposes of that rule, resident aliens include only aliens who have "permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002). Nonimmigrant aliens therefore may not become members.

Petitioners are nonimmigrant aliens who want to be admitted to the Louisiana Bar, but are precluded from being admitted by Section 3(B). Pet. App. 3a, 7a.[1] Petitioners in No. 06-11 (the Leclerc petitioners) are Karen Leclerc, Guillaume Jarry, Beatrice Boulord, and Maureen Affleck. *Id.* at 3a. Leclerc and Jarry are French citizens who were admitted to the United States in J-1 nonimmigrant status; Boulord is a French citizen who was admitted to the United States on a J-1 visa, but who now holds an H-1B visa; and Affleck is a Canadian citizen admitted to the United States as an L-2 spouse. *Id.* at 3a-4a; Pet. 5. All of the Leclerc petitioners hold degrees from foreign law schools. Pet. App. 4a.

In March 2003, the Leclerc petitioners filed suit in the United States District Court for the Eastern District of Louisiana, seeking a declaration that Section 3(B) is preempted by

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[1] Unless otherwise noted, all references to "Pet. App" are to the appendix to the petition in No. 06-11.

federal immigration law and violates the Equal Protection Clause of the Fourteenth Amendment. Pet. App. 5a-6a. The district court rejected both claims. *Id.* at 6a.

Petitioners in No. 05-1645 (the Wallace petitioners) are Caroline Wallace and Emily Maw. Pet. App. 7a. They are British citizens who were admitted to the United States in H-1B nonimmigrant status. *Ibid.* Wallace is licensed as an attorney in England and Wales and is currently performing non-attorney legal work in the United States. *Ibid.* Maw holds a law degree from Tulane University and is performing paralegal work in the United States. *Ibid.*

In May 2005, the Wallace petitioners filed their own suit in the United States District Court for the Eastern District of Louisiana, raising the same preemption and Equal Protection challenges to Section 3(B) as the Leclerc petitioners. Pet. App. 8a. The district court rejected the preemption claim, but held that Section 3(B) violates the Equal Protection Clause. *Ibid.*

3. Appeals were taken in both cases. After consolidating the appeals, Pet. App. 8a, the court of appeals rejected petitioners' preemption and equal protection challenges to Section 3(B). *Id.* at 1a-42a.

The court of appeals first held that Section 3(B) is not subject to strict scrutiny. The court noted that this Court has applied strict scrutiny to state laws affecting "permanent resident aliens," but it has never applied strict scrutiny "to a state law affecting any other alienage classifications." Pet. App. 13a-14a. The court concluded that strict scrutiny applies to alienage classifications that affect permanent residents because such classifications are "seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*," *id.* at 15a (quoting *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978)), and because permanent resident aliens "are similarly situated to citizens in their economic, social and

civic (as opposed to political) conditions." *Id.* at 17a (footnote omitted). The court concluded that those rationales do not support application of strict scrutiny to classifications that apply only to aliens who do not have permanent status in the United States. *Id.* at 19a-21a.

Applying rational basis review, the court held that Section 3(B) is rationally related to the State's legitimate interest in ensuring that lawyers "provide continuity and accountability in legal representation." Pet. App. 23a. The court explained that the State's "ability to monitor, regulate, and, when necessary, discipline and sanction members of the Bar requires that it be able to locate lawyers under its jurisdiction," and that the State could rationally determine that "the easily terminable status of nonimmigrant aliens would impair these interests." *Id.* at 23a-24a. In particular, if a nonimmigrant alien chose to leave the country, "such an attorney would be utterly beyond the reach of the Louisiana Bar." *Id.* at 24a.

The court of appeals also held that Section 3(B) is not preempted by federal immigration law under *Toll* v. *Moreno*, 458 U.S. 1, 12-13 (1982). Pet. App. 29a-31a. The court concluded that "Section 3(B) does not succumb to the *Toll* infirmity of proscribing by state law what Congress expressly permits by federal statute." *Id.* at 30a. The court explained that nonimmigrant aliens may obtain H-1B status to participate in certain legal activities without a license, *id.* at 31a, and federal law "does not itself mandate domestic professional licensing." *Id.* at 32a.

Judge Stewart dissented. Pet. App. 33a-42a. He agreed that Section 3(B) is not preempted by federal immigration law. *Id.* at 33a. He concluded, however, that Section 3(B) should be subjected to strict scrutiny, and that, in any event, Section 3(B) fails to satisfy rational basis review. *Id.* at 33a-42a.

A petition for rehearing en banc was denied. Pet. App. 85a-89a. Judge Higginbotham, joined by six other judges, would have granted rehearing en banc. *Id.* at 86a-88a.

DISCUSSION

I. THE QUESTION WHETHER SECTION 3(B) IS PREEMPTED BY FEDERAL IMMIGRATION LAW DOES NOT WARRANT REVIEW

Petitioners contend (Wallace Pet. 11-15; Leclerc Pet. 18-21) that the Louisiana bar rule's limitation of bar membership to citizens and permanent resident aliens is preempted by federal immigration law. That contention does not warrant review. The court of appeals correctly held that the limitation in Section 3(B) is not preempted by federal immigration law, and the Vermont Supreme Court's erroneous contrary conclusion regarding a similar Vermont rule does not provide a basis for granting review in this case.

A. Section 3(B) Is Not Preempted By Federal Immigration Law

1. a. Petitioners contend (Wallace Pet. 12-13; Leclerc Pet. 20-21) that federal law preempts Section 3(B) as applied to aliens seeking H-1B status to practice law. That contention is without merit. While the power to regulate immigration is exclusively a federal power, the Court has wisely resisted the conclusion that every state enactment that affects aliens is a regulation of immigration and therefore preempted. *De Canas* v. *Bica*, 424 U.S. 351, 354 (1976). Rather, federal immigration law preempts state law when "the nature of the regulated subject matter permits no other conclusion," *id.* at 356 (citation omitted), when "Congress has unmistakably so ordained," *ibid.* (citation omitted), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *id.* at 363 (citation

omitted). Section 3(B) is not preempted under those standards.

An alien may be admitted to the United States in H-1B status in order to work in a "speciality occupation," 8 U.S.C. 1101(a)(15)(H)(i)(b) (Supp. IV 2004), and the practice of law can be a speciality occupation, 8 C.F.R. 214.2(h)(4)(ii). But in order to obtain H-1B status to practice law, an alien must *first* obtain a license from the State in which he or she intends to practice if the State requires such a license. See 8 U.S.C. 1184(i)(2)(A) (requiring "full state licensure to practice the occupation, if such licensure is required to practice in the occupation"); 8 C.F.R. 214.2(h)(4)(v)(A) ("If an occupation requires a state or local license for an individual to fully perform the duties of the occupation," an alien "must have that license prior to approval" of the H-1B visa.). By expressly incorporating a *state law* license as a *precondition* for obtaining permission to come to this country for a temporary period of time to practice law, and by failing to set any limitations on the standards a State may establish for obtaining such a license, Congress left the States largely free to determine those standards.

Thus, when the State where an alien seeks to practice permits an alien seeking H-1B status to obtain a license to practice law in the State, and the alien obtains such a license, that alien satisfies one of the federal law preconditions for obtaining H-1B status. But when the State decides that an alien's temporary status makes him or her ineligible to obtain a license to practice law in the State, and declines to issue a license on that basis, the alien has failed to satisfy one of the federal law prerequisites for obtaining H-IB status.[2]

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[2] Different considerations would be present if a State allowed aliens from some countries and not others to be admitted to the bar. Such a rule could threaten to intrude into the federal government's conduct of

Petitioners contend (Wallace Pet. 12-13; Leclerc Pet. 20-21) that Congress's decision to make a state law license a precondition for H-1B status to practice law shows that Congress intended to require States to allow aliens seeking H-1B status to be eligible to obtain a state license. That reading of the statutory scheme gets matters backwards. Congress has not required States to make aliens eligible for a license so that they would then be eligible for H-1B status. Congress has required aliens to obtain a state law license before becoming eligible for H-1B status.

Another feature of federal immigration law reinforces that conclusion. A section of a DHS regulation entitled "*Duties without licensure*" states that "[i]n certain occupations which generally require licensure, a statute may allow an individual to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation." 8 C.F.R. 214.2(h)(4)(v)(C). The regulation directs that "[i]f the facts demonstrate that the alien under supervision could fully perform the duties of the occupation, H classification may be granted." *Ibid.* That regulation reflects the understanding that an alien's ability to obtain H-1B status depends on the State's choice of licensing standards, not that a State must alter its licensing standards so that a person may become eligible for H-1B status.

That interpretation of the statutory scheme is also consistent with Congress's background understanding that States have important interests that are implicated in their licensing schemes. While many States may conclude that those interests would not be compromised by issuing licenses to those who will be present only temporarily, there is no evidence

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foreign relations. Cf. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363 (2000).

that Congress intended to preclude other States from reaching a different judgment.

It is particularly unlikely that Congress would seek to displace traditional state licensing authority when aliens seeking H-1B status may include persons residing in foreign countries who have no ties to the United States. Aliens who have already been admitted temporarily to the United States in another status may apply for a change of status to H-1B, and persons admitted to this country in an H-1B status may apply for an extension of that status in order to practice law. But there is no indication that Congress intended that such persons, merely by virtue of their presence in this country, would have any greater opportunity to obtain an H-1B status to practice law than persons applying from abroad. DHS's discretionary authority under 8 U.S.C. 1258 to permit certain aliens in the United States to change from one nonimmigrant status to another, like its authority under 8 U.S.C. 1255 (2000 & Supp. IV 2004) to permit certain aliens in the United States to adjust their status from nonimmigrant to permanent resident alien, is essentially a venue provision that enables the government to afford the alien an alternative to leaving the country and applying for a visa from a consulate abroad. See *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978).

Congress's decision to allow States to determine whether to issue a license to a person seeking H-1B status also accords with the nature of the other preconditions for that status. In particular, for an alien to obtain H-1B status, a prospective employer must file a petition on the alien's behalf. 8 C.F.R. 214.2(h)(1)(i) and (2). Just as Congress has made an alien's ability to obtain H-1B status dependent on an employer's judgment that the alien has the necessary qualifications, Congress has made the alien's ability to obtain H-1B status dependent on a State's judgment on whether the alien meets the standards necessary for a license.

b. In support of their contention that federal immigration law preempts Section 3(B) as applied to applicants for H-1B status, petitioners rely (Wallace Pet. 13-14; Leclerc Pet. 19) on *Toll*-v. *Moreno*, 458 U.S. 1, 12-13 (1982). Petitioners' reliance on *Toll* is misplaced.

In *Toll*, the Court held that a policy of the University of Maryland that denied in-state tuition to the dependent children of employees of the World Bank holding G-4 status was preempted by federal law. The court reasoned that Maryland's denial of in-state status to G-4 nonimmigrants directly conflicted with Congress's judgment that G-4 nonimmigrants are permitted to establish domicile in the United States. 458 U.S. at 14. The Court also concluded that Maryland's decision to use tuition as a replacement for lost tax revenue conflicted with Congress's decision to grant G-4 nonimmigrants favorable tax treatment. *Id.* at 16.

The situation here is different from *Toll* in every relevant respect. In *Toll*, the State denied a benefit to aliens that Congress had decided to admit into this country. Here, by contrast, Congress has incorporated state law licensing requirements as a precondition for obtaining H-1B status in the first place. In *Toll*, the state law rule directly conflicted with congressional judgments relating to the G-4 classification. Here, there is no conflict relating to the H-1B classification. Congress allowed each State to make its own determination on whether an alien seeking H-1B status may qualify for the practice of law in that State.[3]

2. In addition to arguing that Section 3(B) is preempted as applied to applicants for H-1B status, petitioners also appear to argue that Section 3(B) is preempted as applied to

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[3] At least two of the petitioners have H-1B status to work as paralegals. Pet. App. 7a. Because that work does not require a state license to practice law, there is no inconsistency between Section 3(B) and the federal authorization to work as a paralegal.

aliens who have J-1 or L-2 status. That claim is also without merit.

Neither the J-1 program nor the L-2 program refers to state licensing requirements. That silence hardly suggests an intent to preempt state licensing authority. Indeed, given that Congress failed to preempt state licensing authority when it specifically focused on state licensing in the H-1B program, it would be difficult to attribute to Congress an intent to preempt such authority through programs that do not mention state licensing at all.

Aliens in the J-1 and L-2 programs are authorized to work in certain circumstances. But the petitioners who have J-1 and L-2 status have not shown that their authorizations preempt state licensing authority. An alien admitted in a J-1 status to participate in an exchange program may work only when that activity is part of the exchange program, 22 C.F.R. 62.16(a), and the petitioners who have J-1 status do not claim that their exchange program includes the licensed practice of law. An alien who holds an L-2 visa may work when authorized by DHS, 8 C.F.R. 214.2(*l*)(7)(ii), and the sole petitioner with an L-2 status has a general work authorization. But a general work authorization is not intended to supersede applicable licensing requirements. Thus, just as Section 3(B) is not preempted as applied to applicants for H-1B status, Section 3(B) is not preempted as applied to the petitioners who have J-1 or L-2 status.

3. For the reasons discussed above, DHS interprets the federal scheme to allow each State to decide the extent to which aliens who seek only temporary residence in the United States will be eligible for bar membership in that State, where, as here, there is no interference with the alien's visa or federal work authorization. That reasoned judgment by the agency with primary authority over the visa and work authorization program is entitled to considerable weight. Cf.

Geier v. *American Honda Motor Co.*, 529 U.S. 861, 883 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 495-496 (1996).[4]

B. The Erroneous Decision Of The Vermont Supreme Court Does Not Provide A Basis For Granting Review In This Case

Petitioners contend (Wallace Pet. 15; Leclerc Pet. 11-12) that review is warranted on the preemption question because the decision below conflicts with *Dingemans* v. *Board of Examiners*, 568 A.2d 354 (Vt. 1989). In that case, the Supreme Court of Vermont held that a rule that limited admission to the state bar to citizens and permanent resident aliens was preempted by federal law. The court acknowledged that the "state has the ultimate interest in assuring the requisite qualifications of persons licensed to practice law within its jurisdiction," and that "the requirement that applicants for H-1 visas have all necessary licenses prior to the issuance of a visa, * * * is a reflection of the federal government's respect for this state prerogative." *Id.* at 356. The court nonetheless concluded that Vermont's limitation on bar membership "impose[d] a burden on the federal immigration program that could not have been intended by the Congress." *Id.* at 357.

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[4] The State contends (Br. in Opp. 16 n.43) that 8 U.S.C. 1622 specifically grants it authority to deny nonimmigrant aliens eligibility for a state license. That contention is incorrect. A State's authority under Section 1622 is limited to "means-tested" public benefits. H.R. Conf. Rep. No. 725, 104th Cong., 2d Sess. 384 (1996). In arguing otherwise, the State relies (Br. in Opp. 16 n.43) on 8 U.S.C. 1621(c). But Section 1621(c) defines the meaning of "State or local public benefit" in Section 1621, not the meaning of "State public benefits" in Section 1622. The term "State or local public benefit" in Section 1621 is used to describe the state or local benefits for which certain categories of aliens (principally aliens present illegally) are ineligible as a matter of federal law. See 8 U.S.C. 1621(a).

For reasons discussed above, that analysis is incorrect. Congress has allowed each State to reach its own judgment on whether an alien's temporary status should affect eligibility for admission to the bar in that State; it did not intend to remove such authority. No other court has adopted the view expressed by the Supreme Court of Vermont, and an erroneous 18-year old decision by a single state supreme court is not a sufficient basis for granting review in this case.

The Supreme Court of Vermont's decision, while incorrect, also does not have an impact that creates a need for review in this case. The result is no different from a Vermont decision interpreting a rule to allow aliens who are not permanent residents to obtain a license to practice law, which it could have done.

Review is also unwarranted because the Supreme Court of Vermont did not have the benefit of DHS's views in resolving the preemption question. Now that DHS has expressed its view on that issue, the nature of the preemption question must be evaluated in a different light. It should now be clear to Vermont that if it wishes to bar aliens who are not permanent residents from bar membership, federal immigration law does not preclude that course. On the other hand, to the extent that Vermont's 18-year experience with admitting such aliens leads it to conclude that there is no reason to alter its current rule, Vermont may leave matters unchanged. Either way, there is no reason for the Court to grant plenary review based on the conflict between the Supreme Court of Vermont and the decision below.

II. THE QUESTION WHETHER SECTION 3(B) IS SUBJECT TO STRICT SCRUTINY DOES NOT WARRANT REVIEW

Petitioners contend (Wallace Pet. 5-11; Leclerc Pet. 12-17) that the court of appeals erred in failing to apply strict scrutiny to Louisiana's rule that only citizens and permanent resi-

dent aliens may become members of the Louisiana bar. Review of that contention is also not warranted. The court of appeals correctly held that Section 3(B) is not subject to strict scrutiny, and that conclusion does not conflict with any decision of this Court or with the holding of any other court of appeals.

A. Section 3(B) Does Not Trigger Strict Scrutiny

For several reasons in combination, Section 3(B) does not trigger strict scrutiny. First, while petitioners rely primarily on *In re Griffiths*, 413 U.S. 717 (1973), as support for their strict scrutiny argument (see Wallace Pet. 5-10; Leclerc Pet. 13), *Griffiths* involved a bar rule that limited membership to citizens only and therefore excluded permanent resident aliens as well as nonimmigrant aliens from the practice of law. 413 U.S. at 719. Moreover, the person challenging the rule in *Griffiths* was herself a permanent resident alien. *Id.* at 718. Louisiana's rule, by contrast, permits permanent resident aliens to become members of the bar; it excludes from eligibility only aliens who are not permanent residents. The Court's holding that the bar rule in *Griffiths* was subject to strict scrutiny therefore does not establish that Louisiana's rule is subject to strict scrutiny.

Petitioners point (Wallace Pet. 5) to the statement in *Griffiths* that "[c]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." 413 U.S. at 721 (quoting *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971)). And, in reliance on *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977), they argue (Wallace Pet. 8-10; Leclerc Pet. 14-15) that Louisiana's bar rule classifies based on alienage because it is directed at aliens and only aliens are adversely affected by it.

In cases decided after *Griffiths*, however, the Court has made clear that *Griffiths* did not establish that strict scrutiny

applies to all classifications based on alienage. For example, in *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978), the Court held that state law classifications based on alienage are not subject to strict scrutiny when they restrict aliens from employment in government jobs that involve "discretionary decision-making, or execution of policy, which substantially affects members of the political community." And in *Mathews* v. *Diaz*, 426 U.S. 67, 81-84 (1976), the Court held that Acts of Congress that classify on the basis of alienage are subject to a narrow standard of review akin to rational basis review, rather than to strict scrutiny. As those cases illustrate, the statement in *Griffiths* that alienage classifications are subject to strict scrutiny cannot be divorced from the context in which it appeared. And a crucial part of that context was that the state law at issue excluded permanent resident aliens as well as nonimmigrant aliens from the practice of law; *Griffiths* itself involved only a challenge by a permanent resident.

The same is true of all the other cases cited by petitioners. All of those cases involved state laws that adversely affected permanent resident aliens. See, *e.g.*, *Nyquist*, *supra*; *Examining Bd. of Eng'rs* v. *Flores de Otero*, 426 U.S. 572 (1976); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham*, *supra*. Indeed, in *Foley*, the Court expressly noted it had applied strict scrutiny to alienage classifications only when the state laws were "seemingly inconsistent with the congressional determination to admit the alien to *permanent residence*." 435 U.S. at 295 (emphasis added).

Second, basic equal protection principles do not support the conclusion that strict scrutiny applies to all state classifications that adversely affect nonimmigrants simply because strict scrutiny applies to many state classifications that disadvantage permanent resident aliens. The Equal Protection Clause's core command is that "persons similarly circumstanced should be treated alike." *Plyler* v. *Doe*, 457 U.S. 202,

216 (1981) (citation omitted). At the same time, the Equal Protection Clause "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Ibid.* (citation omitted).

Because permanent resident aliens have been formally granted the privilege under federal law of living in the United States on a lasting basis, see 8 U.S.C. 1101(20), and they typically have strong ties to the United States, they may be viewed as similarly situated to citizens in many respects. Nonimmigrants, by contrast, have not been granted that distinct legal status under federal law; they are present only temporarily and subject to restrictions, and they do not ordinarily have the same ties to this country as permanent residents. They therefore do not, as a rule, have the same claim to equal treatment. Cf. *Mathews*, 426 U.S. at 80 (as an alien's ties to the United States grow stronger, so too does his claim to equal treatment).

Third, the claim for equal treatment is particularly unpersuasive here because Section 3(B) affects all aliens who are not permanent resident aliens, and that group includes persons who apply from abroad for visas or work authorizations and have no ties to this country and no claim under the Constitution to equal treatment. See, *e.g.*, *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950). To be sure, that group also includes nonimmigrant aliens who were admitted into this country for a limited period and for a different purpose. But as previously discussed, such persons have limited work rights, and they are in no stronger position to obtain H-1B status or broader employment opportunities than aliens applying from abroad. A provision for nonimmigrants to adjust or change their status or work rights is merely a "*procedural mechanism* by which an alien [already in the United States] is assimilated to the position of one seeking to enter the United States." *In re Rainford*, 20 I. & N. Dec. 598, 601

(B.I.A. 1992) (emphasis added); see *Elkins*, 435 U.S. at 667; *Tibke* v. *INS*, 335 F.2d 42, 44-45 (2d Cir. 1964). Such aliens are far more similarly situated to persons applying for such status from abroad than they are to permanent resident aliens and citizens.

Finally, as previously discussed, Congress has expressly incorporated state law licensing requirements as a precondition for the granting of H-1B status to practice law. Because Congress has broad power over immigration matters, federal laws that classify based on alienage do not trigger strict scrutiny. Instead, they are subject only to review that is akin to rational basis review. *Mathews*, 426 U.S. at 81-84. It follows that, absent circumstances not present here (see note 2, *supra)*, when Congress expressly incorporates a state law requirement as a precondition for the grant of a visa, strict scrutiny of that federally incorporated state law requirement is not warranted. Similar considerations apply to the petitioners who are in J-1 or L-2 status, because federal law does not preempt the application of Section 3(B) to them. See pp 7-16, *infra*; *Toll*, 458 U.S. at 11 n.16 (suggesting that the Court's equal protection cases involving aliens may be better explained as preemption cases). The court of appeals therefore correctly concluded that strict scrutiny is not applicable in the specific context presented here.

B. There Is No Conflict In The Circuits On Whether Strict Scrutiny Applies Here

Petitioners contend (Wallace Pet. 10; Leclerc Pet. 10) that the court of appeals' failure to apply strict scrutiny to Section 3(B) conflicts with the Fourth Circuit's decision in *Moreno* v. *University of Maryland*, 645 F.2d 217 (1981), aff'd *sub nom. Toll* v. *Moreno*, 458 U.S. 1 (1982). There is, however, no conflict.

In *Moreno*, the district court applied strict scrutiny and held that Maryland's rule denying in-state tuition to G-4 nonimmigrants violated the Equal Protection Clause. The court alternatively ruled that Maryland's policy was preempted by federal law. *Moreno* v. *Toll*, 489 F. Supp. 658 (D. Md. 1980), aff'd *sub nom. Moreno v. University of Md.*, 645 F.2d 217 (4th Cir. 1981), aff'd *sub nom. Toll* v. *Moreno*, 458 U.S. 1 (1982). The Fourth Circuit affirmed the district court's rulings stating only that "[f]or reasons sufficiently stated in this opinion of the district court, we agree that the University's 'In-State' status policy * * * is invalid under the Constitution." *Moreno*, 645 F.2d at 220. This Court affirmed the judgment, but solely on the ground that Maryland's policy was preempted by federal law. *Toll*, 458 U.S. at 9-10.

It is unclear whether the Fourth Circuit would feel entirely bound by its affirmance of the district court's constitutional analysis in *Moreno*, when this Court resolved the case solely on preemption grounds, and the Fourth Circuit did not conduct its own independent constitutional analysis. But even if it would, the district court's equal protection ruling in *Moreno* does not conflict with the holding below that Section 3(B) is not subject to strict scrutiny.

Moreno involved the equal protection rights of G-4 nonimmigrants, a classification not at issue here. And *Moreno* involved an additional burden on aliens that conflicted with the conditions under which they were admitted into the country, not a congressionally-sanctioned state-law precondition for obtaining a particular nonimmigrant status in the first place, or a federal work status that does not specifically authorize the practice of law. Because the decision below is the first case to address whether strict scrutiny applies in the present context, and because the court below correctly concluded that it does not, this Court's review of the question is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 05-1645 & 06-11

In the
Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,
Respondents

KAREN LECLERC, ET AL.,
Petitioners,

v.

DANIEL E. WEBB, ET AL.,
Respondents

On Petitions for a Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR THE COALITION OF SERVICE INDUSTRIES, INC., IN SUPPORT OF PETITIONERS

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August 2006

Motion for Leave To File a Brief *Amicus Curiae*

The Coalition of Service Industries, Inc. ("the Coalition"), hereby moves for leave to file the attached brief *amicus curiae* ("the Brief") in support of Petitioners.

Counsel for Petitioners have consented in writing to the filing of the Brief. Counsel for Respondents have refused consent, stating that an *amicus* brief is in their view not proper unless and until the Court issues a writ of certiorari.

The Brief addresses only the importance of the Questions Presented, not the merits. Therefore it is only in the present procedural posture of the case that it could be helpful.

As shown in the Brief's discussion of *The Interest of the Amicus Curiae*, the Coalition is uniquely and well qualified to address the adverse impact of the decision below on pending and planned U.S. treaty negotiations to obtain more liberal rules for American lawyers and law firms to provide U.S. legal services abroad. The Louisiana rule at issue discriminates against foreigners on the basis of nationality. Experience in prior treaty negotiations demonstrates that other nations will contend that such denial of "National Treatment" to them is good reason to reject U.S. requests for more liberal rules for Americans, in the legal services and quite possibly additional sectors. Liberalization of those rules is of material value to the U.S.

Respectfully submitted,

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Brief Amicus Curiae of the Coalition of Service Industries, Inc.

I. THE INTEREST OF THE AMICUS CURIAE

The Coalition is an incorporated non-profit membership association organized under and existing pursuant to the laws of the District of Columbia.[1] It is an advocacy organization dedicated to the reduction of barriers to U.S. services exports including legal services, and to the development of constructive domestic U.S. policies to enhance the global competitiveness of its members. Since its formation in 1982 the Coalition has worked with and offered advice on trade issues to U.S. government agencies such as the Office of the United States Trade Representative ("USTR") and the Departments of Commerce and Treasury.[2]

Robert Vastine, President of the Coalition since 1996, previously served in various Congressional staff posts and as Deputy Assistant Secretary of the Treasury for International Trade and Raw Materials Policy. He has authored many publications on U.S. trade policy. He chairs the official Industry Trade Advisory Committee for International Trade in Services and chaired its pre-2004 predecessor, Industry Sector Advisory Committee 13. Representatives of Coalition members, including members

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[1] No counsel for a Party authored any part of this Brief. No person other than the Coalition, its members or counsel made a monetary contribution to its preparation or submission.

[2] A chronology of CSI interaction with government agencies from April 2003 into 2006 appears at Services Drive Growth, Recent CSI Events, http://www.uscsi.org/meetings/.

of its Legal Services Committee, also have experience on these advisory committees. At almost monthly meetings the committees receive briefings from USTR and other agencies respecting progress and foreign objections in their negotiations and provide recommendations to them on how to meet the objections and on affirmative industry goals.

With the Department of Commerce, the Coalition has co-sponsored annual symposia on the progress and goals of the negotiations.[3] It cooperates with like-minded private sector organizations such as the European Services Forum and the Australian, Brazilian, Canadian, Chilean, Hong Kong and Japanese services organizations.

The Coalition and its members thus have a unique basis within the private sector to address the importance of the Questions Presented. The Coalition is concerned that other nations will view the Louisiana rule denying access to its bar examination and practice of law to a sub-classification of legally admitted aliens as a significant obstacle to U.S. efforts to negotiate more liberal rules for trade in legal and possibly other services in ongoing U.S. negotiations in the World Trade Organization and in other multilateral and bilateral negotiations.

II. SUMMARY OF ARGUMENT

The Louisiana rule at issue here discriminates on the basis of nationality against foreigners legally resident in this

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[3] For example, the January 12, 2005, symposium, held in the Main Auditorium at Commerce, was entitled "Services Liberalization in the Doha Round: US Industry Priorities", http://www.uscsi.org/meetings/.

country.[4] Americans can practice law in the state, the foreign Petitioners cannot. The rule runs counter to the growing trend in international relations not to discriminate on the basis of nationality. The Congress, the Administration, and United States trade representatives support that trend, convinced that our country will benefit from it.

The U.S. has for example asked many other nations not to discriminate against American lawyers who provide or wish to provide legal services in foreign countries. Because reciprocity plays a large role in trade negotiations, a foreign backlash against the already well-known Louisiana rule, if it be allowed to stand, could adversely affect our legal community in the several important trade negotiations that are currently underway or planned.

While the backlash would focus on legal services, it could prejudice our negotiations in other sectors as well. In any event, the direct monetary value of American legal services provided abroad is itself substantial. Moreover, of even greater value are the investments and commercial transactions that American businesses are likely to make abroad if they can obtain assistance from American lawyers and law firms whom they know and trust.

Expansion of our foreign trade is of large national importance. As the Associated Press reported on July 11,

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[4] "National Treatment" means that each WTO Member "shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers." General Agreement on Trade in Services, Article XVII, http://www.wto.int/english/docs_e/legal_e/26-ats_01_e.htm.

2006, newly appointed Secretary of the Treasury Henry Paulson pledged "to make sure the country does not retreat from the global economy", remarking that "the strength of the U.S. economy is linked to the strength of the global economy." He cautioned that "If we retreat from the global stage, the void is likely to be filled by those who do not share our commitment to economic reform." He added that he planned to expand trade and investment.

Few aspects of present day American legal services to foreign nations are protected by treaty, and they are vulnerable to domestic protectionist elements that would surely try to exploit the discrimination inherent in the Louisiana rule. Some nations already affirmatively prohibit or substantially constrain the provision of American legal services. The ongoing treaty negotiations could, if successful, gain treaty protection for existing practices and open up markets that are closed.

There thus is an important national interest at stake in whether the Louisiana rule will be allowed to stand. That interest argues strongly for review by this Court.

III. ARGUMENT

A. Delivery of American Legal Services Abroad Is of Substantial Value to the Nation's Legal Community and Economy

The value of cross-border exports of U.S. legal services has increased for many years and stood at $3.9 billion for 2004, while cross-border imports declined to $754 million. For 2003, the latest year for which relevant data are available, the value of legal services provided to foreigners by U.S.

law firm offices abroad was $1.1 billion.[5] Today at least 107 U.S.-based law firms have an aggregate of at least 460 foreign offices.[6] The United States, and U.S. law firms, thus have a substantial monetary interest in exports of legal services.

The experience of the Coalition and its members indicates that many of the consumers of such services are U.S. entities doing business abroad. They generally prefer to receive legal assistance from firms with which they are familiar, firms that are knowledgeable about U.S.-law aspects of what they are doing and what they are constrained from doing.[7] Thus U.S. based law firms substantially facilitate the making of foreign investments and the conduct of business abroad, as well as compliance with applicable constraints imposed by U.S. law. In view of the magnitude of foreign investments and transactions for which U.S. lawyers and firms provide legal services, the

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[5] United States Department of Commerce, Bureau of Economic Analysis, October 2005 Survey of Current Business, U.S. International Services; Cross-Border Trade in 2004 and Sales Through Affiliates in 2003, at 25, 28, 30, 40, 45-46,75, http://bea.gov/bea/pub/1005cont.htm

[6] These figures are based on a review of Martindale-Hubbell Law Directory 2006 listings for San Diego, San Francisco, and Los Angeles, California, New York, New York, and Washington, D.C. Though incomplete, the figures probably suggest the magnitude of U.S. law firms' current and potential future foreign operations.

[7] *See, e.g.*, Collective Request-Legal Services, March 2006, 1. Introduction, http://www.uscsi.org/wto/crequests.htm ("In addition to contributing to a business-friendly environment for investment, greater foreign investment is encouraged if host-country regulatory systems permit investors to have access to their own legal advisers.").

importance of exports of legal services to the U.S. economy is far greater than the dollar value of those services themselves, although harder to quantify.

B. Delivery of American Legal Services Abroad Is an Important Issue in Pending Treaty Negotiations

USTR has recognized the importance of exporting legal services in its trade negotiations for many years. The starting point for such negotiations is the fact that American lawyers and law firms enjoy few treaty rights to establish offices and to practice U.S. or local domestic law abroad. It was not until the Uruguay Round Agreements of 1994 that services were addressed in negotiations conducted under the auspices of the General Agreement on Tariffs and Trade, established in 1947. The Uruguay Round Agreements include the General Agreement on Trade in Services ("GATS") and established the World Trade Organization ("WTO") as the institutional successor to GATT.

In recognition that it had achieved very limited liberalization in services, GATS called for the reopening of services negotiations beginning in 2000. The Office of the United States Trade Representative ("USTR") began public preparations for renewed negotiations with a Federal Register notice and request for comments on objectives on March 28 of that year.[8] Those negotiations are ongoing

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[8] *See*, Trade Policy Staff Committee, Public Comments for Mandated Multilateral Trade Negotiations on Agriculture and Services in the World Trade Organization (WTO) and Priorities for Future Market Access Negotiations on Non-Agricultural Goods, Notice and Request for Comments, 65 F.R. 16450 (2000).

today, as part of what is known as the Doha Round. In this context the Coalition has continued to work closely with U.S. negotiators[9] and foreign private-sector interests to bring about significant liberalizations of legal services among others.

WTO negotiations involve both requests for and offers of liberalization. In March 2003 the U.S. requested the developed-nation Members of the WTO to afford broad rights to U.S. lawyers and law firms to practice U.S. law including international law and the right to take bar examinations in and practice domestic law on the same terms and conditions that apply to a Member's own citizens.[10] The U.S. has also joined with Australia, Canada, the EC, Japan, New Zealand and Norway in a Collective Request for similar liberalization. This request seeks among other things removal of nationality requirements and consideration of "permitting foreign lawyers, subject to satisfying domestic licensing requirements, the right to provide legal services in domestic law." *See*, Collective Request, *supra* Note 7, at 3. These requests do not anticipate WTO agreement to require all its Members to comply with them. Rather, the requests seek voluntary binding agreements by individual Members that they will afford the requested access and treatment.

USTR has known for years that agreement in the Doha Round might be delayed because of difficulties of reaching

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[9] The principal U.S. negotiators work at USTR. They cooperate with the Departments of Commerce and Treasury, in consultation with other authorities including the Department of Justice.

[10] The U.S. has not made the request public, but a summary of it appears at http://www.abanet.org/cpr/gats/us_request.doc.

agreements in the agricultural sector. While nonetheless still actively seeking agreement in the Round, USTR has also negotiated and is today negotiating bilateral and regional free trade agreements.[11] USTR has sought in these negotiations the same liberalized access to foreign markets for American lawyers as set forth in its Request to WTO Members and in the Collective Request.

C. If Allowed To Stand, the Decision Below Is Likely To Adversely Affect U.S. Efforts To Obtain Further Liberalization in Trade in Services, Particularly Legal Services.

Reciprocity naturally plays a large role in trade negotiations. For examples, Australia's WTO May 26, 2005, Revised Service Offer for legal services is expressly and "in particular . . . conditional upon the degree of liberalization proposed in the same sectors in the offers of other WTO Members", and the EU's Conditional Revised Offer "is conditional on other WTO Members making substantive offers in sectors where the EU has made requests."[12]

In the legal services sector, the U.S. is constrained in what it can offer by the fact that regulation of the sector in this country is historically the province of the individual states, which USTR respects. Foreign negotiators, and their

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[11] *See, e.g.*, U.S. Hopes Central American Trade Pact Takes Effect "Very Soon", http://usinfo.state.gov/wh/Archive/2006/Jun/05-961219.html; *USTR Portman prepares Congress for OMAN Deal* (March 31, 2006), http://www.texasfairtrade.org/article.php?story=20060331093406816&mode=print.

[12] WTO Services Offers, http:www.uscsi.org/wto/. The public offers of many additional Members are available at this site.

lawyer constituencies who are generally vigilant to keep foreign lawyers away, are quick to object that something that the U.S. has requested is not available in every U.S. jurisdiction. This has been particularly true for establishment of foreign offices of U.S. law firms and the right in those establishments to practice the full range of law that American lawyers are authorized to practice in their home jurisdictions, *i.e.*, to act as "Foreign Legal Consultants" ("FLCs").

At the time of the Uruguay Round Agreements only 16 U.S. jurisdictions had rules that allowed FLCs to practice under any conditions. The inability of foreign lawyers to serve as FLCs in many U.S. jurisdictions was frequently and strongly objected to as a reason for other WTO Members not to liberalize. Ten more jurisdictions have FLC rules today,[13] but the objections continue to dog the U.S. negotiators and arise in exchanges between the Coalition and foreign legal representatives.

Recognizing the importance of USTR's efforts to liberalize trade in legal services, the American Bar Association and other associations are trying to enhance USTR's negotiating position by encouraging U.S. jurisdictions to adopt a liberal model rule for FLCs and a model rule to allow foreign lawyers to temporarily practice the law of their home jurisdictions.[14]

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[13] *See*, State Implementation of Recommendations 8 and 9- Quick Guide, L. Terry, *Summary of State Action on ABA MJP Recommendations 8 & 9*,Table 1, http://www.abanet.org/cpr/jclr_home.html

[14] *See, e.g., id* at Table 2.

State-imposed nationality requirements have not yet played a large role in USTR's negotiations, quite possibly because until the present controversies it appeared to be the law that states could not blithely discriminate against legally admitted aliens. *E.g.*, *Toll v. Moreno*, 458 U.S. 1, 10 (1982); *Mathews v. Diaz*, 426 U.S. 67, 81 (1976); *In re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson*, 423 U.S. 365, 378 (1971); *cf.*, GATS 2000, Request from the EC and Its Member States, Professional Services, EC Request to the United States of America, A. LEGAL SERVICES (March 2003) (asking for removal of federally-imposed citizenship requirements to practice before the U.S. Patent and Trademark Office and changes in state FLC rules, but not mentioning any nationality requirement to practice law), http://www.gatswatch.org/requests-offers.html#outgoing. Persons active in foreign bar associations are, however, now well aware of the Fifth Circuit's rulings in the present cases. If those rulings stand, they will provide yet another argument for other nations to withhold the treaty commitments that the U.S. is seeking in the legal services sector.

That argument can gain force by the fact that many nations do not impose any nationality requirement for the practice of law.[15] That argument can also gain force by the

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[15] *See, e.g.*, J. Quinn, *The Right to Practice Law in the European Union: An American Perspective*, 2004 Macquarie Business Law Journal, at "IV US LAWYERS RIGHTS TO PRACTICE IN THE EU" (England), http://www.austlii.edu.au/journals/MqBLJ/2004/6.html; Japan Federation of Bar Associations, Japanese Attorney System, 2. Qualifications to Become Attorneys, http://www.nichibenren.or.jp/en/about/system.htm l (Japan); Council of Bars and Law Societies of Europe, Conditions for the admission of lawyers from non-EU Member States, http://www.ccbe.org/doc/En/gats_questionairre_en.pdf.

unpersuasiveness of the Fifth Circuit's asserted interest of Louisiana in denying "non-resident" aliens[16] access to the practice of law, namely, the supposed difficulty of enforcing disciplinary rules against those aliens who assume and then neglect litigation responsibilities. The Fifth Circuit cites not a single instance of disciplinary problems with foreign lawyers who have been authorized to practice their law in New York since 1974[17] or in other states including Louisiana. For its part, the Louisiana Supreme Court apparently was unconcerned with actual experience with foreign lawyers, as it rejected proposals from two of its Justices to study the issue. *See, In re Bourke,* 819 So.2d 1020, 1022 (dissenting opinion of Chief Justice Calogero), *reh'g denied,* 820 So.2d 565 (2002); *In re Rogot,* 819 So.2d 278 (La. 2002); *In re Marty, et al.,* 819 So.2d 278 (La. 2002).

The Fifth Circuit ignored too the existing rules of the Louisiana Supreme Court that authorize it to impose a variety of sanctions including disbarment and to notify other authorities of action taken. *See, e.g.*, La. Sup. Ct. Rule XIX, Rules for Lawyer Disciplinary Enforcement ("Types of Sanctions . . . .H. Notice to National Discipline Data Bank . . . .A. [Notice to Disciplinary Agencies] of every other jurisdiction in which the respondent is admitted. . . . B. Public Notice . . . ."), http://www.lasc.org/rules/supreme/RuleXIX.asp; Rule XIX

(France, Germany, Iceland, Italy, Luxembourg, and Sweden).

[16] It is a matter of some concern that in general American lawyers practicing abroad are not entitled to permanent residence there.

[17] *See*, Sydney M. Cone, III, INTERNATIONAL TRADE IN LEGAL SERVICES (Little, Brown 1996), section 3.2.1.

Appendix E, Guidelines Depicting Conduct which Might Warrant Permanent Disbarment, http://www.lasc.org/rules/supreme/RuleXIXApp.E.asp.

Disbarment is of course a very potent sanction. Any lawyer, regardless of where located, would certainly wish to avoid the disgrace involved in that, or in lesser public sanctions. Lawyers would also want to avoid notice to their home jurisdiction of discipline imposed by other jurisdictions. Among other things, such notice could lead to sanctions in the home jurisdiction.

Foreign lawyers would also not want to lose the right to represent to clients and potential clients that they are members of a bar in the U.S. and can practice Louisiana law.

The Fifth Circuit paid no heed to the deterrent strength of the risk of sanctions under existing rules. A fortiori, it did not address the possibility, which could easily be raised in trade negotiations, that Louisiana could condition the right to practice law on consent to the jurisdiction of Louisiana courts for any professional activities carried out or having effects in the state, thereby affording any complaining clients ready access to a convenient forum.

The Fifth Circuit appears to have proceeded on the basis of the assumption that many non-resident aliens would engage in litigation. While that would be theoretically possible, the experience of the Coalition and its members indicates that many and likely the great majority of foreign lawyers who gain admission to practice in a U.S. jurisdiction do not want to engage in litigation in American courts. There they would often be at a substantial disadvantage due to cultural and historical differences from the American lawyers they would oppose. Rather, the foreigners generally wish to

represent clients in business transactions that are or may be governed in whole or in part by the law of a state or by federal law. Membership in a U.S. bar is extremely important in terms of attracting and performing such work. The Fifth Circuit wholly ignored the non-litigation appeal of membership in a U.S. bar to foreign lawyers.

The unusual circumstance that Petitioners Carolyn Williams and Emily Maw wish to represent the accused in capital cases, challenging imposition of the death penalty on a pro-bono basis, is likely to add to resentment in other nations that have decided on humanitarian grounds to do without that sanction, if the ban against their admission to practice in Louisiana is upheld.

In sum, the absence of any substantive, factually-based justification for Louisiana's discrimination on the basis of nationality can only aggravate the difficulty that the U.S. faces in persuading other nations to open their markets or to keep them open to American lawyers. The decision below could even prejudice the U.S. in free trade negotiations in other sectors, negotiations that are already difficult. In addition, a lack of access to American legal services abroad for American businesses would likely adversely impact achieving longstanding U.S. goals of increasing international trade and investment.

IV. CONCLUSION.

The foregoing considerations respecting the importance of the Questions Presented favor issuance of the writ of certiorari.

Respectfully submitted,

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August 2006

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IN THE

Supreme Court of the United States

CAROLINE WALLACE and EMILY MAW,

Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,

Respondents,

KAREN LECLERC, ET AL.,

Petitioners,

v.

DANIEL E. WEBB, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AND ASIAN AMERICAN JUSTICE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Asian Pacific American Bar Association ("NAPABA") and the Asian American Justice Center ("AAJC") hereby respectfully move, pursuant to Supreme Court Rule 37.3(b), for leave to file the attached brief *amici curiae* in support of the petition for writ of certiorari in this case. NAPABA and AAJC have obtained the consent of the attorneys for the Petitioners. However, Respondents have refused to give such consent.

NAPABA is the national association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA advocates for the legal needs and interests of the Asian Pacific American community and represents the interests of over 40,000 attorneys and 47 local Asian Pacific American bar associations, who work variously in solo practices, large firms, corporations, legal services organizations, non-profit organizations, law schools, and government agencies.

AAJC is a national, non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over fifty years of experience in providing legal public policy, advocacy, and community education on discrimination issues.

In the instant case, NAPABA and AAJC support the Petitioners' petition for writ of certiorari because the Louisiana regulation at issue disturbingly echoes past state laws that were used against lawfully admitted non-citizens to restrict their opportunities for earning a livelihood. The Fifth Circuit's refusal to apply strict scrutiny to the Louisiana

regulation fails to take into account the history of discrimination against aliens and their relative lack of political power, both of which this Court has recognized time and again as reasons for applying strict scrutiny. NAPABA and AAJC's brief *amici curiae* addresses the history of discrimination that has justified this Court's application of strict scrutiny to alienage classifications in the past, and explains the present plight of the many nonimmigrant aliens who are valuable and ongoing participants in American society, but who are denied the full protection of the Fourteenth Amendment by the Fifth Circuit's erroneous decision. Thus, NAPABA and AAJC's brief *amici curiae* will aid this Court's decision as to whether to grant a writ of certiorari to Petitioners.

Accordingly, NAPABA and AAJC respectfully request that the Court grant their motion for leave to file the attached brief *amici curiae* in support of Petitioners.

Respectfully submitted,

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QUESTION PRESENTED

Our nation's immigrant history shows that states have, at times, enacted restrictions on the ability of aliens to earn a livelihood, and such restrictions have been motivated by antagonism toward those of particular races and national origins.

Amici will address the following question:

Whether the Fifth Circuit's application of rational basis review to Louisiana's rule precluding nonimmigrant aliens from practicing law was in error given this Court's custom of applying strict scrutiny review to similar alienage classifications due, in part, to this nation's history of invidious discrimination against aliens.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Asian Pacific American Bar Association ("NAPABA") is a national, nonprofit, nonpartisan organization whose mission, in addition to serving the professional interests of our members, is to advocate for the legal needs and civil rights of the Asian Pacific American community. NAPABA is an association of Asian Pacific American attorneys, judges, law professors, and law students, providing a national network for its members and affiliates. NAPABA represents the interests of over 40,000 attorneys and 47 local Asian Pacific American bar associations. Since its inception in 1988, NAPABA has been at the forefront of national and local activities in the areas of civil rights, and combating anti-immigrant backlash and hate crimes. NAPABA's interest in this case arises from the fact that historically states have used alienage classifications as a vehicle to discriminate against individuals of Asian Pacific descent. Given NAPABA's role in ensuring equality to Asian Pacific Americans, and the history of discrimination against non-citizen Asian Pacific individuals in which states restricted the rights of aliens to enter professions, own land and operate businesses, NAPABA has a substantial interest in discouraging any laws based on alienage classifications that have the effect of inflicting those same injustices.

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[1] In accordance with Supreme Court Rule 37.3(a), *Amici Curiae* have filed with the Clerk of the Court letters from Petitioners consenting to the filing of this brief. No person or entity other than *Amici Curiae*, their members or their counsel made a monetary contribution toward the preparation or submission of the brief, and no counsel for Petitioners or Respondents had any role in authoring this brief.

The Asian American Justice Center ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates, the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California and the Asian American Institute have over fifty years of experience in providing legal public policy, advocacy, and community education on discrimination issues. AAJC is interested in the present case because it implicates the availability of civil rights protections and the full social and political participation of Asian Americans in this country.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision not to apply strict scrutiny to Louisiana's Rule 3(B)[2] prohibition against certain non-citizens becoming lawyers contravenes long-standing precedents designed to protect discrete and politically disadvantaged minorities from unfair treatment. The regulation at issue here hauntingly echoes past state laws that prohibited certain subclasses of aliens from pursuing particular occupations or from owning land, or that imposed heavier burdens on persons in certain industries, based solely on their status as aliens. The Fifth Circuit has forgotten that alienage classifications have been a vessel for irrational jealousy and hatred. That history has justified this Court's earlier conclusion that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (footnotes omitted). This Court should grant the petitions for writ of certiorari in order to bring under the shield of the Equal Protection Clause the many thousands of "nonimmigrant aliens" who, despite that label and despite the Fifth Circuit's factual misconceptions, are full and valuable members of our society.

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[2] Louisiana Supreme Court Rule XVII § 3(B) ("Rule 3(B)") requires that "[e]very applicant for admission to the Bar of this state shall * * * [b]e a citizen of the United States or a resident alien thereof." As defined by the Louisiana Supreme Court, a "resident alien" is an alien who has "attained permanent resident status in the United States." *In re Bourke*, 819 So. 2d 1020, 1022 (La. 2002).

ARGUMENT

I. THE FIFTH CIRCUIT'S ASSERTED DISTINCTION BETWEEN "IMMIGRANT ALIENS" AND "NONIMMIGRANT ALIENS" IGNORES THE REALITY OF OUR SOCIETY

The Fifth Circuit disregarded this Court's earlier decisions because of its belief that the status of aliens who do not hold permanent resident visas (whom the Fifth Circuit calls "nonimmigrant aliens") is "far more constricted than that of resident aliens." *LeClerc v. Webb*, 419 F.3d 405, 418 (5th Cir. 2005), *reh'g en banc denied*, 444 F.3d 428 (5th Cir. 2006). Attempting to rationalize and limit this Court's earlier decisions, the Fifth Circuit argues that permanent resident aliens are "similarly situated to citizens in their economic, social and civic (as opposed to political) conditions," and that holders of F-1 student or H1-B temporary visas are not so similarly situated. *Id.* But the Fifth Circuit ignores the reality that "nonimmigrant aliens," just like permanent resident aliens, occupy an important place in our society and also deserve the full benefit of the Equal Protection Clause.

The Wall Street Journal recently told the story of Manajit Sengupta, a meteorologist who has been in the United States for more than 10 years on F-1 student and H1-B temporary visas. *See* June Kronholz, *Under a Cloud: For Dr. Sengupta, Long-Term Visa Is a Long Way Off*, Wall St. J., June 27, 2006, at A1, A13. He owns a home in the U.S., is raising a six-year-old U.S.-born citizen daughter here, and believes, "This is my country, as far as I'm concerned now." *Id.* at A13. While his employer is now seeking to obtain permanent residency status for him, Dr. Sengupta continues to wait in his current status as an H1-B visa holder. *See id.* at A1.

Dr. Sengupta is not the only "nonimmigrant alien" enduring that wait. Approximately one million aliens a year

become permanent legal residents, with a majority (66% in 2005) living in the United States when they become legal permanent residents. *See* Kelly Jefferys & Nancy Rytina, Office of Immigration Statistics, U.S. Dep't of Homeland Security, *Annual Flow Report: U.S. Legal Permanent Residents, 2005* (hereinafter "*Annual Flow Report*") 1 (Apr. 2006), available at http://www.uscis.gov/graphics/shared/statistics/index.htm#flow (last visited Aug. 3, 2006). And the application process to do so is cumbersome:

> The Labor Department, which clears one of the three forms that most skilled immigrants must file to become permanent residents, has a backlog of 235,000 cases. The Citizenship and Immigration Service, which clears the second form, is 180,000 cases behind.

Kronholz, *supra*, at A1. According to the current visa bulletin published by the U.S. Department of State, which is the agency that actually issues the permanent resident visas, there is a five-year backlog for employer-sponsored permanent resident visas for skilled workers and professionals. *See* U.S. Dep't of State, Visa Bulletin, http://travel.state.gov/visa/frvi/bulletin/bulletin_2978.html (last visited Aug. 3, 2006). The Fifth Circuit's view of all "nonimmigrant aliens" as "transients" who can be treated differently because they have less of an attachment to this country is seriously flawed, and fails to take into account the slowness of our immigration bureaucracy.

As the largest group waiting to become legal permanent residents, Asian "nonimmigrant aliens" suffer adversely from the chronic backlog in the immigration process. In 2005, Asia was the leading region of origin of aliens who became legal permanent residents. *See Annual Flow Report* at 3. On a per country basis, India and China,

respectively contributed the second and third largest numbers of legal permanent residents. *See id.* at 5.

One of Amici's counsel and a NAPABA member, Bhanu Sadasivan, herself illustrates the wrongness of the Fifth Circuit's view. Born in India, Dr. Sadasivan has been in the United States for twelve years on temporary and student visas. She arrived in the United States in 1991 on an F-1 student visa to study immunology at Yale University. After completing her Ph.D. in 1997, she became a post-doctoral follow at Brigham and Women's Hospital in Boston, which, along with the Harvard Medical School, helped her obtain an H-1B visa. In 2001, she decided to study law and was admitted to the Boalt Hall School of Law at the University of California, Berkeley. She then applied for an F-1 student visa and remained a nonimmigrant student visa holder until 2004. Dr. Sadasivan currently practices as a patent litigation attorney in California. Had Louisiana's Rule 3(B) applied to her, she likely would never even have considered going to law school.

The Fifth Circuit's decision, if allowed to stand, would permit a state to discriminate, based on their alien status and without strict scrutiny, against thousands of "nonimmigrant aliens" in situations like Dr. Sengupta's or Dr. Sadasivan's, who just like "immigrant aliens" are similar to citizens "in their economic, social and civic conditions." The Fifth Circuit's reasoning rings false especially in light of the contributions of H1-B visa holders, which, according to Stanford University economist Dan Siciliano, are "necessary to avoid irreversible damage" to the U.S. economy. Kronholz, *supra*, at A13. According to the National Science Foundation, the "foreign-born now account for about half of the Ph.D. engineers, life scientists, physical scientists and math and computer scientists in the U.S. . . . ." *Id.* The Fifth Circuit's strained distinction between "immigrant aliens" and "nonimmigrant aliens" in deciding who should benefit from

the full safeguards of the Equal Protection Clause would leave many of those people exposed to disparities in treatment under our laws, based solely on their alien status. Such a distinction has no warrant in either justice or wisdom, as a review of our history will disclose.

II. LIVELIHOOD RESTRICTIONS APPLIED TO ALIENS OR SUB-CLASSES OF ALIENS HAVE CREATED TERRIBLE INJUSTICES IN THE PAST.

Historically, livelihood restrictions against aliens, in many cases specifically Asian immigrants, have stemmed from national origin and/or racial bias. Early Chinese immigrants to the United States, for example, "were feared as competitors whose harder work and longer hours for cheap pay would drive down the standard of living of American labor." Thomas Sowell, *Ethnic America: A History* 136-37 (1981). California adopted several laws that imposed special taxes on miners who were not citizens. *See* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 Cal. L. Rev. 529, 543-45 (1984). Facially, the laws were neutral as to race and national origin. *See, e.g.*, Act of Apr. 13, 1850, ch. 97, § 1, 1850 Cal. Stat. 221, 221; Act of May 4, 1852, ch. 37, § 1, 1852 Cal. Stat. 84, 84; Act of Mar. 30, 1853, ch. 44, § 1, 1853 Cal. Stat. 62, 62. However, the historical context indicates that Chinese miners were their primary targets. McClain, *supra*, at 536, 539-40. In the 1850s, "24,000 Chinese, two thirds of the Chinese population in America, were working in California mines." Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* 82 (1989).

California's laws did not just distinguish aliens from citizens. Rather, some of them focused on particular categories within the class of aliens. The 1854 version of the

California foreign miners tax law applied only to those aliens who had not "declared [their] intention[s] to become" U.S. citizens. Act of May 13, 1854, ch. 49, § 1, 1854 Cal. Stat. 55, 55. The 1855 version provided that "foreigner[s] ineligible to become . . . citizen[s] of the United States" were required to pay higher taxes than those foreigners who were eligible for citizenship. Act of Apr. 30, 1855, ch. 174, § 1, 1855 Cal. Stat. 216, 216–17. These distinctions between categories of aliens—between those who had declared their intention to become citizens and those who had not, and between those who were eligible to become citizens and those who were not so eligible—confirmed that the laws were aimed at the Chinese miners, since it was only the Chinese, being non-white, who were ineligible for citizenship. McClain, *supra*, at 543-44; Takaki, *supra*, at 82.[3] The enforcement of these laws

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[3] Congress, for much of our history, used racial categories to define eligibility for naturalization. First, only "free white person[s]" were eligible to become naturalized U.S. citizens. Act of Mar. 26, 1790, ch. 3, § 1, 2 Stat. 103, 103 (1790). Congress then extended eligibility to "aliens of African nativity and to persons of African descent." Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (1870). "In 1940, descendants of races indigenous to the Western Hemisphere were also made eligible, [Nationality Act of 1940, ch. 876,] 54 Stat. [1137,] 1140 [(1940)]; in 1943 Chinese were made eligible, [Act of Dec. 17, 1943, ch. 344,] 57 Stat. [600,] 601 [(1943)]; and in 1946 Filipinos and persons of races indigenous to India were made eligible, [Act of July 2, 1946, ch. 534,] 60 Stat. 416, [416 (1946)] . . . . . While it is not altogether clear whether the statute should be interpreted to include or to exclude certain peoples, *see* Note, 54 Harv. L. Rev. 860, 864-5 (1941), it seems to be accepted [as of 1948] that Japanese are among the few groups not eligible for citizenship." *Oyama v. California*, 332 U.S. 633, 635 n.3 (1948). Not until 1952, with the passage of the

(Footnote continued)

by local sheriffs often led to violence against, and the murders of, Chinese miners. McClain, *supra*, at 548-53, nn.52, 148. The atrocities, however, often went without judicial remedy given the fact that California's laws also prohibited the acceptance of testimony by Chinese witnesses in court. *Id.* at 548-53.

The immigration of Japanese to the United States later sparked other racial animosities, leading California and other states to adopt laws prohibiting aliens from owning land. Takaki, *supra*, at 203-08. These laws on their face applied to all aliens regardless of race or national origin, but they were aimed mainly at immigrant Japanese farmers. *See* Robert Higgs, *Landless by Law: Japanese Immigrants in California Agriculture to 1941*, 38 J. Econ. Hist. 205, 215 (1978); Dudley O. McGovney, *The Anti-Japanese Land Law of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (collecting state statutes). As California's Attorney General stated, the goal of such laws was "to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land." Higgs, *supra*, at 215.

Under the California Alien Land Law of 1913, only "aliens eligible to citizenship" (which the Japanese were not, *see supra* note 3) could acquire land. Act of May 19, 1913, ch. 113, § 1, 1913 Cal. Stat. 206, 206. All other aliens could acquire land only if a treaty between their country of origin and the United States so permitted. *Id.* § 2. If no such treaty existed, they were limited to the right to lease agricultural land for no more than three years. *Id.* The state also

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McCarran-Walter Act, did Congress abandon general color or geographic classifications in favor of a quota system based on national origin. *See* McCarran-Walter Act, Pub. L. No. 414, 66 Stat. 163 (1952).

prevented alien-controlled corporations from owning agricultural lands. *Id.* § 3. And in the event that a covered alien would otherwise acquire title to any real estate, the statute provided that such property would escheat to the state. *Id.* §§ 4–6. When Japanese immigrant farmers sought to evade the restrictions of the 1913 law through purchasing land in the names of their U.S.-born citizen children, California enacted the Alien Land Law of 1920, which forbade leasehold as well as ownership and barred the immigrants from acting as guardians for minors owning or leasing land. The 1920 law again called for escheat to the state of any land found to be held in violation of its prohibitions. Act of Nov. 2, 1920, § 1, 1920 Cal. Stat. 87, 87. These California laws were subject to a variety of challenges in federal and state courts in the 1920s, but were generally upheld. Higgs, *supra*, at 219; *see, e.g.*, *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding a similar law in the State of Washington).

In later litigation in this Court, California "disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect," pointing out that "nowhere in the statute is there a single mention of race, color, creed or place of birth or allegiances as a determinant of who may not own or hold farm land." *Oyama v. California*, 332 U.S. 633, 650 (Murphy, J., concurring). But, as Justice Murphy pointed out in a well-researched and detailed opinion concurring in the Court's decision to invalidate the law as applied to the citizen son of a Japanese immigrant:

> The California Alien Land Law was spawned of the great anti-Oriental virus which, at an earlier date, infected many persons in that state. . . . Beginning in 1850, with the arrival of substantial numbers of Chinese immigrants, racial prejudices and discriminations began to mount. Various laws and ordinances were

enacted for the purpose of discouraging the immigrants and dramatizing the native dissatisfaction. Individual Chinese were subjected to many acts of violence. Eventually, Congress responded to this popular agitation and adopted Chinese exclusion laws.

It was not until 1900 that Japanese began to arrive in California in large numbers. . . . [T]he arrival of the Japanese fanned anew the flames of anti-Oriental prejudice. History then began to repeat itself. White workers resented the new influx, a resentment which readily lent itself to political exploitation. Demands were made that Japanese immigration be limited or prohibited entirely. Numerous acts of violence were perpetrated against Japanese businessmen and workers, combined with private economic sanctions designed to drive them out of business. Charges of espionage, unassimilativeness, clannishness and corruption of young children were made against these "Mongolian invaders." Campaigns were organized to secure segregated schools and to preserve "America for the Americans."

* * * *

Many Japanese were engaged in agricultural pursuits in 1913 and they constituted a substantial segment of the California farm labor supply. From 1900 to 1910, Japanese-controlled farms in California had increased from 4,698 acres to 99,254 acres. The agricultural situation thus offered a fruitful target for the anti-Japanese forces, who had

> been balked in their attempts to secure a ban on all Japanese immigration and to outlaw Japanese acquisition and enjoyment of residential and commercial property. In this new endeavor they were eminently successful.

Oyama, 332 U.S. at 651-55 (Murphy, J., concurring).

Alienage classifications also became the vehicle for denying Asians the right to practice law in the United States. Hong Yen Chang, a native of China sought to practice law in the United States and submitted a certificate of naturalization issued by a New York court. Noting that federal law did not allow citizenship for "persons of the Mongolian race," the California Supreme Court voided the certificate of naturalization and denied Hong Yen Chang the right to practice law. *In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890). Like Hong Yen Chang, Takuji Yamashita, a Japanese national, also sought to practice law. The Supreme Court of Washington denied Mr. Yamashita's application to practice law on the ground that Mr. Yamashita was ineligible for citizenship. *In re Yamashita*, 70 P. 482 (Wash. 1902). In an unprecedented move, the Washington Supreme Court recently reversed its ruling and admitted Mr. Yamashita posthumously to the Washington state bar. *See* Heather Foster, *Victim of racism will gain posthumous bar membership*, Seattle Post-Intelligencer, February 5, 2001, at 1. Recognizing the grave injustice to Mr. Yamashita, Washington Supreme Court's chief justice, Gerry Alexander, stated, "it's important to symbolically right this wrong." *Id.* As this Court's past decisions have shown, application of strict scrutiny in the present case would avoid similar injustices in the future.

III. THIS COURT'S PRIOR DECISIONS HAVE PROTECTED ALIENS—AND SUBCLASSES OF ALIENS—FROM DISCRIMINATORY LAWS AFFECTING THEIR LIVELIHOODS

The Fifth Circuit's decision not to accord suspect class status to Petitioners and not to exercise strict scrutiny in judging Louisiana's Rule 3(B) ignores the sad history of alienage distinctions in U.S. law. The Court should grant a writ of certiorari in this case in order to fulfill its promise of protecting "discrete and insular minorities" through heightened judicial scrutiny. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). From an early time, this Court has recognized that, "The [F]ourteenth [A]mendment to the [C]onstitution is not confined to the protection of citizens." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). "It is established . . . that an alien is entitled to the shelter of the Equal Protection Clause. This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community.'" *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) (citations omitted) (quoting *Truax v. Raich*, 239 U.S. 33, 41 (1915)).

The Court should follow here the path it earlier laid out in *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). There, the Court struck down a 1945 California law banning the issuance of commercial fishing licenses to any "person ineligible to citizenship." Act of May 2, 1945, ch. 181, § 2(c), 1945 Cal. Stat. 659, 600. This law, like the 1854 and 1855 foreign miner tax and the alien land laws, distinguished among different categories of aliens, *i.e.*, between aliens eligible for citizenship (who could receive fishing licenses) and aliens not eligible for citizenship (who could not). Justice Murphy, in his concurring opinion, observed that the ban was a "direct outgrowth of antagonism toward persons of Japanese ancestry" and "was intended to

discourage the return to California of Japanese aliens," who had been excluded from the state during World War II. *Takahashi*, 334 U.S. at 422-24 (Murphy, J., concurring). However, the Court's majority found it "unnecessary to resolve th[e] controversy concerning the motives that prompted enactment of the legislation." *Id.* at 418. Rather, the Court noted that

> the Fourteenth Amendment protect[s] "all persons" against state legislation bearing unequally upon them either because of alienage or color. *See Hurd v. Hodge*, 334 U.S. 24 [1948]. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.

Id. at 420. Despite the fact that the law prohibited only a subclass of aliens from receiving fishing licenses, the Court found the law to be an impermissible discrimination based on alien status. Referring also to the federal government's exclusive power over immigration, the Court rejected California's claims that the state could "adopt one or more of the same classifications [as used by the federal government to regulate immigration and naturalization] to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living." *Id.* at 418-19.

Later decisions of this Court applied strict scrutiny to a variety of alienage classifications that disadvantaged aliens or subclasses of aliens. *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) (higher education assistance); *Sugarman*, 413 U.S. at 634 (civil service); *In re Griffiths*, 413 U.S. 717, 721 (1973) (bar membership); *Graham*, 403 U.S. at 373 (welfare

benefits). In no case did the Court condition its holdings on the fact that the aliens at issue held permanent resident visas. Nor in any of those cases did the Court exclude "nonimmigrant aliens" from the scope of the relief granted.

IV. THE PERNICIOUS HISTORY OF ALIENAGE DISCRIMINATION WARRANTS STRICT SCRUTINY IN THIS CASE TO PRESERVE FUNDAMENTAL PRINCIPLES OF AMERICAN JUSTICE

This Court has repeatedly recognized that a history of discrimination against a particular class of people, such as aliens, makes regulations based on such a classification appropriate for strict scrutiny analysis. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (explaining that "traditional indicia of suspectness" include the fact that a class has been "subjected to . . . a history of purposeful unequal treatment"). Because of their status as non-citizens, aliens are less capable of protecting themselves in the political process, and therefore require greater protection by the courts. In *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 (1976), the Court struck down a federal policy that barred all non-citizens from employment in the competitive civil service. This Court noted that aliens are a "class of persons who, entirely apart from the rule [discriminating against them on the basis of alienage], are already subject to disadvantages not shared by the remainder of the community," such as lacking the right to vote. *Id.* at 102. As Justice Blackmun noted in *Toll v. Moreno*, 458 U.S. 1, 20 (1982) (Blackmun, J. concurring) (citations omitted), "both common experience and the unhappy history reflected in our cases . . . demonstrate that aliens often have been the victims of irrational discrimination." Such "disparate treatment accorded to a class of 'similarly circumstanced' persons who historically have been disabled by the prejudice of the majority" led the Court, in Justice Blackmun's view,

"to conclude that alienage classifications 'in themselves supply a reason to infer antipathy,' . . . and therefore demand close judicial scrutiny." *Id.* at 20-21 (quotations omitted).

In *Griffiths* this Court acknowledged that:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. (Citations omitted). If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Griffiths, 413 U.S. at 720 (quoting *Truax*, 239 U.S. at 41). The Fifth Circuit's decision not to apply strict scrutiny to the alienage classification at issue here ignores that important principle.

V. CONCLUSION

We should take this lesson from our nation's immigrant history: restrictions on the ability of aliens to earn a livelihood have been entangled with antagonisms and jealousies directed toward those of particular races and national origins. That history warrants the application of "suspect class" analysis to aliens adversely affected by Rule 3(B). The role of lawyers in the preservation of a just society, and the importance of fostering legal representation for the most disadvantaged segments of our national community, make it even more important that Rule 3(B) undergo strict scrutiny to ensure its compliance with the Equal Protection Clause.

For the many thousands of "nonimmigrant aliens" who cherish the freedoms and opportunities that their adopted country provides, and who seek through their work and contributions to repay those gifts, such strict scrutiny may be the only defense against the kind of injustice that scourged earlier generations of American immigrants. The stories of today's immigrants verify this Court's observation that, "[f]rom its inception, our Nation welcomed and drew strength from the immigration of aliens," and that "admission to the practice of law in the courts of a State 'in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all.'" *Griffiths*, 413 U.S. at 719 (quoting *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1872)). By granting a writ of certiorari to review the Fifth Circuit's unduly narrow constriction of the Equal Protection Clause's scope, this Court would continue to uphold the ideals set forth in cases such as *Griffiths*, *Oyama* and *Takahashi*—ideals that make our country a model for the rest of the world.

Respectfully submitted,

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IN THE

Supreme Court of the United States

CAROLINE WALLACE AND EMILY MAW,
Petitioners,

v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,
Respondents,

KAREN LECLERC, ET AL.,
Petitioners,

v.

DANIEL E. WEBB, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF TULANE UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

05-1645

CAROLINE WALLACE AND EMILY MAW,
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v.

PASCAL F. CALOGERO, JR., IN HIS OFFICIAL CAPACITY AS CHIEF JUSTICE OF THE LOUISIANA SUPREME COURT, ET AL.,
Respondents,

06-11

KAREN LECLERC, ET AL.,
Petitioners,

v.

DANIEL E. WEBB, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION OF TULANE UNIVERSITY LAW SCHOOL FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), Tulane University Law School ("Tulane") respectfully moves this Court for leave to file the accompanying brief as an *amicus curiae* in support of the Petitions in Nos. 05-1645 and 06-11 (as consolidated by this Court).

A letter of consent to the filing of this brief has been received from Petitioners Wallace and Maw. Respondents, Pascal F. Calogero, Jr., in his official capacity as Chief Justice of the Louisiana Supreme Court, et al., have declined to consent, thereby requiring this motion.

Tulane's interest in this case stems from its more than 150 years of international legal training and focus on comparative law. In recognition of the trend towards globalization of the legal profession, Tulane fashioned a unique curriculum by incorporating both the common law and civil law traditions. Foreign students comprise a significant percentage of Tulane's student body, and these students contribute considerably to the academic environment. To promote its international mission, Tulane has built significant relationships with foreign legal institutions. As a result, Tulane has developed a worldwide reputation as an elite legal training ground, particularly in the field of international and comparative law.

The Fifth Circuit's ruling upholding the Louisiana Supreme Court's revised interpretation of Rule XVII Section 3(B) detrimentally impacts both the Tulane and the Louisiana legal community. *Compare In re Bourke*, 819 So.2d 1020, 1022 (La. 2002), *reh'g denied*, 820 So.2d 565 (2002) (reinterpreting the term "resident alien" in Section 3(B) as limited to aliens who have been granted permanent resident status in the United States and excluding those who are lawfully residing in the country under a temporary visa with a finite term) *with In re Appert*, 444 So.2d 1208 (La. 1984) (holding that all foreign nationals lawfully within the United States are considered "resident aliens") and *In re Respondek*, 442 So.2d 435 (La. 1983) (interpreting the term "resident alien" to mean an alien who is lawfully residing in the United States). Louisiana will suffer monetary loss and its citizens will be deprived of the specialized expertise that nonimmigrant alien lawyers offer. Indigent and underrepresented clients will be particularly harmed by Louisiana's alienage-based ban

because foreign lawyers, like the petitioners, often champion less remunitive or unpopular causes.

The Fifth Circuit's decision has slammed the door in the face of Louisiana's nonimmigrant law students legally admitted into the United States, forcing them to sit for the bar in states other than where they attended law school and established their U.S. residence. If this newly-minted discrimination against nonimmigrant aliens spreads to other states and professions, it will create a greater jurisdictional patchwork and handicap the ability of foreign students and lawyers to practice their specialized professions in the United States. This result would reduce the pool of qualified professionals in this country and heighten the potential for backlash from foreign institutions and governments to the detriment of the international legal community. All of these concerns hamper Tulane's ability to remain competitive in the local, national, and international legal marketplaces. Accordingly, Tulane University Law School respectfully requests leave to file the accompanying *amicus curiae* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Tulane University Law School ("Tulane") has educated lawyers for over 150 years. Guided by Louisiana's unique legal history and heritage, one of Tulane's principle missions is to provide a welcoming and rigorous academic environment for both U.S. and foreign students.

Tulane has diligently developed an extensive international and comparative law curriculum and actively recruits foreign students for admission to its J.D. and LL.M. programs. In recent years, the foreign students have comprised nearly ten percent of the student body and have contributed substantially to Tulane's academic environment. Tulane also has built significant relationships with legal institutions throughout the world. As a result of its hard work, some have ranked Tulane as the leading comparative law school in the country and it has earned a worldwide reputation for its international and comparative law programs.

Tulane is significantly harmed by the Fifth Circuit's interpretation and application of constitutional law with respect to upholding Louisiana State Bar Rule XVII Section 3(B) ("Section 3(B)"). The ruling detrimentally impacts Tulane's educational environment and, as a consequence, adversely affects the local and national legal communities. One petitioner, Emily Maw, received her J.D. from Tulane in 2003 and has been denied admission to the Louisiana State Bar, the state in which she has continuously resided since enrolling at Tulane.[2] The Fifth Circuit's decision hampers Tulane's abil-

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[1] Pursuant to SUP. CT. R. 37.6, counsel for *amicus curiae* authored this brief in its entirety. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

[2] Petitioner, Emily Maw, is a member of the Mississippi Bar and resides in New Orleans, Louisiana. Maw is the Director of the Innocence Project–New Orleans. Unlike many other Louisiana Bar members, Maw promptly returned to her post after Hurricane Katrina to serve her indigent clients. Additionally, the U.S. government recently granted Maw a three-year visa extension.

ity to fulfill its international mission, to maintain its elite reputation for the study of international and comparative law, and to remain competitive in the legal education marketplace.

SUMMARY OF ARGUMENT

The Fifth Circuit erred in upholding the Louisiana Supreme Court's reinterpretation of Section 3(B) as constitutional under the Equal Protection Clause of the Fourteenth Amendment. In the face of *In re Griffiths*, 413 U.S. 717 (1973), Louisiana is the only state in the nation to deny lawfully admitted aliens admission to its bar. The practical result is that nonimmigrant aliens "lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such states as chose to offer hospitality." *Truax v. Raich*, 239 U.S. 33, 42 (1915). The restricted scope for those eligible for the Louisiana Bar under Section 3(B) violates the Fourteenth Amendment because "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax*, 239 U.S. at 41.

This Court recently recognized the benefits of classroom diversity as important and laudable. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). These benefits will be stifled by the Fifth Circuit's decision that prevents nonimmigrant aliens from sitting for the Louisiana Bar, thereby discouraging nonimmigrant aliens from attending law schools in Louisiana. Tulane and its students are, and will be, harmed as the distinct contributions of international students at the law school diminish. The Louisiana Bar will also suffer a shortage of attorneys with innate understanding of foreign legal systems and cultures. Lawyers frequently represent foreign countries and resident nationals in U.S. courts, and precluding nonimmigrant aliens' admission to the Louisiana Bar hampers the

ability of clients to receive the quality of representation they may require in an ever-globalizing economy.

The ruling does not comport with Louisiana's regulation of most other specialized professions. The risk of transient professionals leaving the jurisdiction is in no way particular to attorneys. If the ruling stands, Louisiana may choose to deny nonimmigrant aliens licenses in other professions. This would significantly impact all nonimmigrant aliens as well as educational programs at Tulane and other educational institutions. Moreover, other states could elect to follow Louisiana's departure from precedent.

The reinterpretation of Section 3(B) also violates the Supremacy Clause. The rule prohibiting nonimmigrant aliens from sitting for the Louisiana Bar directly contradicts the federal law authorizing such aliens to enter the United States to pursue a specialized profession upon obtaining the requisite licensing. Moreover, employers will be discouraged from sponsoring aliens for legal permanent residency as expressly provided by Congress in the Immigration and Nationality Act. Tulane's resulting inability to place well-qualified foreign students in employment limits its ability to attract them to the school, thereby severely tarnishing Tulane's international allure. The tremendous negative impact on Tulane, as well as on other institutions of higher education and the legal community, caused by the Fifth Circuit's misinterpretation of the Equal Protection and Supremacy Clauses merit grant of certiorari to decide the important issues presented in this case.

ARGUMENT

Petitioners present compelling legal reasons for granting certiorari in this case: The Fifth Circuit's ruling violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, and directly contradicts federal law that preempts Louisiana State Bar Rule XVII Section 3(B) under

the Supremacy Clause, U.S. Const. art. VI. *Amicus curiae* will show how this unconstitutional discrimination against nonimmigrant aliens harms Tulane, its alumni, the Louisiana Bar, and Louisiana residents. If this ruling is allowed to stand and is extrapolated to other states and professions, the negative impact will be felt nationwide.

I. THE DECISION BELOW IMPEDES TULANE'S LONG-STANDING MISSION OF BEING A SCHOOL OF INTERNATIONAL STATURE.

Tulane has emphasized international and comparative law studies as part of its curriculum since the 1850's. As one of the first U.S. law schools to implement a dedicated international and comparative program, Tulane scholars literally wrote the first book on comparative law in the United States.[3] Because of its preeminence in this field, Tulane was selected as the host institution for the Centennial World Congress on Comparative Law in 2000, drawing distinguished jurists and legal scholars from around the world.[4] Tulane's comparative and international law program is one of the best and longest-standing in the country.[5]

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[3] *See* Gustavus Schmidt, *The Civil Law of Spain and Mexico* (New Orleans: printed for the author by T. Rhea) (1851) (Gustavus Schmidt was a founder and former Dean of Tulane University Law School).

[4] *See* Nick Marinello, *Comparative Law: Back to the Future*, Inside Tulane (November 15, 2000), *available at* http://www2.tulane.edu/EditorialNewsDetails.cfm?EditorialID=469 (last visited July 28, 2006).

[5] Ugo Mattei, *Some Realism about Comparativism: Comparative Law Teaching in the Hegemonic Jurisdiction*, 50 Am. J. Comp. L. 87, 95 (2002) (In the rankings, "[t]he gold medal is given to Tulane Law School."). *See also* David Clark, *The Oxford Handbook of Comparative Law* (David Clark et al., eds., Oxford University Press) (forthcoming Nov. 2006). In analyzing the development of comparative law in the United States, Mr. Clark devotes an entire section of Chapter 5 to Tulane Law School, the only law school meriting such consideration.

Due to Louisiana's unique civil law history and its locale, Tulane is distinctly situated to attract international students. As one of the only U.S. schools that provides extensive and in-depth instruction in both civil and common law, Tulane serves as a bridge between the two major legal systems of the Western world. International students choose Tulane because of its ability to teach both legal systems and provide a unique learning atmosphere. Tulane now finds itself in a jurisdiction that denies qualified nonimmigrant aliens the opportunity to practice law in the state of their choice, impeding Tulane's ability to attract foreign students who have always enriched the school.

Tulane attracts international students by providing a welcoming academic environment both inside and outside the classroom. Tulane offers a wealth of common law and civil law courses, including over eighty courses related to international issues; seminars, symposia, and lectures on all aspects of international and comparative law through the Eason-Weinmann Center for Comparative Law; nine summer school sessions abroad in six different countries; and student and faculty exchange programs with twelve international universities on four continents. Tulane's international and comparative law courses are taught by a well-published and internationally-recognized permanent and visiting faculty.[6] Tulane's student-edited publications include the *Tulane Journal of International & Comparative Law*, and *The Tulane Law Review*, the masthead for which has long read: "*Devoted to the Civil Law, Comparative Law & Admiralty Law.*"[7]

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[6] Tulane is one of the few universities in the world to have two faculty members elected to the Academy of Comparative Law at the Hague—Professors Thanassi Yiannopoulos and Vernon Palmer. Professor Palmer was recently knighted as a *Chevalier* in the French Legion of Honor.

[7] Additionally, the *Tulane Law Review*, founded in 1916 as the *Southern Law Quarterly*, became an official organ of the *Comparative Law Bureau Annual Bulletin of the American Bar Association* in 1929. Although the motto of *Tulane Law Review* has undergone minor changes

In addition, Tulane publishes *The Tulane European & Civil Law Forum*, a faculty-edited journal.

Tulane also promotes education of foreign lawyers in other ways. For example, Tulane sponsors a Ph.D. program in American Law for members of the law faculty at the Monterrey Institute of Technology in Monterrey, Mexico. Tulane also supports international students by offering significant scholarships and grants. The Louisiana legal community assists Tulane in welcoming and promoting the education of foreign students.[8] For instance, several New Orleans law firms hold receptions each year for Tulane's international LL.M. students in order to build relationships with these foreign lawyers.

The 2002 reinterpretation of Section 3(B) to prevent nonimmigrant aliens from obtaining state licensure significantly impedes Tulane's efforts to preserve a diverse international student body and maintain the law school's international prestige. The decision discourages prospective international applicants from attending Tulane, knowing that they will not be afforded the same professional opportunities offered in other jurisdictions.[9]

No other state in the country has a restriction to bar licensure, like the one created under Section 3(B), that discriminates against nonimmigrant aliens.[10] Some states have

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over the years, its founding motto was "Dedicated to Civil Law, Comparative Law and Codification."

[8] Ironically, even the Louisiana Supreme Court promotes its international heritage by advertising "its roots in the colonial governments established by France and Spain." *See* Louisiana Supreme Court History, *available at* http://www.lasc.org/about_the_court/history.asp (last visited July 27, 2006).

[9] Other U.S. jurisdictions allow all international students to be admitted to the State's Bar. *See, e.g.*, N.Y. CT. R. §§ 520.1-520.15 (the bar admission rules of New York do not impose a residency requirement).

[10] *See* Eric Freeman, *Barriers to Foreign Professionals Working in the United States*, Center for Economic and Policy Research, *available at* http://www.cepr.net/publications/professional_supplement.htm (last

addressed Louisiana's transiency concerns through bar admissions rules without violating the Equal Protection Clause, while still welcoming foreign lawyers. For example, South Dakota and Minnesota allow nonresidents to be admitted to the bar upon establishing an office in the state, or upon appointing an agent within the state to accept service.[11] This solution addresses transiency concerns while allowing the states to maintain the benefits of admitting immigrant lawyers to their respective bar.[12]

Interestingly, the Louisiana Bar continues to allow foreign-trained lawyers who have never attended law school in the United States to be admitted to the bar.[13] The ABA

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visited July 28, 2006). Contrary to Respondents' contention, neither New Hampshire nor Rhode Island prohibit the licensing of nonimmigrant aliens. *See* R.I. SUP. CT. R., art. II, R. 1(a) (an applicant must be "a citizen of the United States or legal resident"). *See* N.H. SUP.CT.R. 42(3)(a) ("any person domiciled in the United States . . . shall be eligible to apply for examination"); N.H. REV. STAT. 21:6-a ("Residence or residency shall mean a person's place of abode or domicile. The place of abode or domicile is that designated by a person as his principal place of physical presence for the indefinite future to the exclusion of all others.").

[11] Minn. Bar Admiss. R. 4; S.D. CODIFIED LAWS § 16-16-2.

[12] As Petitioners argue, the appropriate standard to apply to this analysis is strict scrutiny. Under strict scrutiny, Louisiana's concerns regarding transiency (if compelling) must be addressed in the least restrictive means possible. The statutes in South Dakota and Minnesota suggest at least one possibility of a "least restrictive means possible" approach to address the concerns of the Louisiana Bar Association. *See* Minn. Bar Admiss. R. 4; S.D. CODIFIED LAWS § 16-16-2.

[13] *See* La. Bar Admiss. R. XVII, § 6; *see also Jia v. Bd. of Bar Exam'rs*, 696 N.E.2d 131 (Mass. 1998) (In *Jia*, the court held that Jia could not be admitted to the Massachusetts Bar despite the fact that Jia's Chinese law degree combined with his M.C.L. and S.J.D. received from Tulane qualified him to sit for, and be admitted to, the state bars of Louisiana and New York.). Indeed, before the 2002 reinterpretation, other nonimmigrant aliens were admitted to the Louisiana Bar under the identically worded rule.

guidelines presume that foreigners who receive a J.D. from a U.S. law school will be eligible for bar admission.[14] Only Louisiana has deviated from the ABA's universal assumptions, generally adhered to by other U.S. states. Louisiana's reinterpretation of Section 3(B) results in nonimmigrant aliens who study law in the United States, at ABA approved institutions, being denied the opportunity to sit for the Louisiana Bar while others who never studied in a U.S. law school are eligible to practice law in the States. This result is not rational.

In an era when "[a]ny law dean worth his or her salt will tell alumni and students that it is important for their school to be 'international,'" many law schools are seeking to diversify their educational programs.[15] The decision is likely to discourage foreign students from seeking admission to any U.S. law school out of fear that bar admission rules may change in other states while the nonimmigrant student is attending school. That is, foreign applicants will find themselves in the same situation as the petitioners in this case.[16] Foreign students seeking an international legal education are now presented with a number of opportunities to study in countries like Australia, Asia, and Europe. Given the potentially hostile environment these students could face in the

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[14] The American Bar Association (ABA) Lawyer's Manual on Professional Conduct recognizes that foreign trained lawyers may seek admission to U.S. State Bars. The Manual states that foreign lawyers may be required to take the bar exam and/or attend law school in the United States in order to be admitted to the bar. *See* ABA/BNA Lawyer's Manual on Professional Conduct, last updated June 28, 2006.

[15] David E. Van Zandt, *Globalization Strategies for Legal Education,* 36 U. Toledo L. Rev. 213, 213 (2004).

[16] This fear is not unfounded. When Petitioners Maw and Wallace began law school, the Louisiana Bar admitted similarly-situated nonimmigrant aliens to the Bar. *Compare In re Bourke,* 819 So.2d 1020, 1022 (La. 2002), *reh'g denied,* 820 So.2d 565 (2002) *with In re Appert,* 444 So.2d 1208 (La. 1984) and *In re Respondek,* 442 So.2d 435 (La. 1983).

United States, they may opt not to seek admission to U.S. schools in light of opportunities available in other countries. This is a result that has far reaching consequences for both U.S. law schools and the practice of law in this country.

If this Court does not grant certiorari to clarify the issues presented, the rationale used to justify the discrimination against nonimmigrant aliens in bar licensure may be extended to other professions. Currently, most Louisiana professional licensing authorities do not prevent nonimmigrant aliens from obtaining professional licenses. For instance, non-citizen applicants for medical licenses are only required to present a valid visa entitling them to work and reside in the United States.[17] In fact, the Louisiana Board of Medical Examiners grants nonimmigrant aliens a temporary license to be used during the pendency of their nonimmigrant visa application.[18] Additionally, the State does not require engineers to meet residency requirements before obtaining state licensure.[19] Among the other professions in Louisiana that do not limit licensure based on alienage status are: horticulturists,[20] home inspectors,[21] occupational therapists[22] and radiologic technologists.[23]

All professions have some risk that individual professionals will skirt their duties and leave behind injured persons with no recourse. However, to date, despite the same risks

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[17] LA. ADMIN. CODE tit. 46, pt. XLV, § 311(A)(3).

[18] LA. ADMIN. CODE tit. 46, pt. XLV, § 401(A).

[19] LA. ADMIN. CODE tit. 46, pt. LXI, § 903; *see also Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976) (holding that prohibition on aliens engaging in private practice of engineering deprived them of their constitutional rights).

[20] LA. ADMIN. CODE tit. 7, pt. XXIX, § 105.

[21] LA. ADMIN. CODE tit. 46, pt. XL, § 113.

[22] LA. ADMIN. CODE tit. 46, pt. XLV, § 1907.

[23] LA. ADMIN. CODE tit. 46, pt. XLV, § 2907.

due to transient professionals as the practice of law, most other professions in the state of Louisiana welcome non-immigrant aliens. It strains reason to argue that a lawyer leaving the jurisdiction is different from a doctor or home inspector in terms of potential damage they may cause, or the disaster that goes unfixed as a result of a client having no recourse. Because there is no known record or evidence of such transiency problems in any of these other professions in Louisiana (or, indeed, in the legal profession for that matter), the justification for the newly-adopted interpretation of Section 3(B) is ephemeral.[24]

If this anti-alien interpretation of Section 3(B) is permitted to stand, Louisiana or any other state could assert the same unsupported transiency rationale to exclude all nonpermanent resident aliens from any and all licensed professions despite their lawful presence and right to work in the United States. In effect, Louisiana would be able to control how H1-B visas are granted to nonimmigrant aliens seeking employment in Louisiana. The negative implications are powerful for all nonimmigrant aliens, as well as all educational programs at Tulane and throughout the United States.

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[24] Even under rational basis scrutiny, the Fifth Circuit's decision—and Louisiana Section 3(B) as reinterpreted—should not survive constitutional scrutiny. *See, e.g., Raffaelli v. Comm. of Bar Exam'rs*, 496 P.2d 1264, 1275 (Cal. 1972) (holding that statute requiring U.S. citizenship for bar admission violated the Equal Protection Clause because "[t]he classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries."); *Application of Park*, 484 P.2d 690, 691-692 (Alaska 1971) (In assessing whether a citizenship requirement for bar admission was constitutional, the court analyzed whether there was a rational connection between one's fitness to practice law and citizenship; the court held there was no rational connection.).

II. THE DECISION BELOW HAS NEGATIVELY IMPACTED TULANE'S ADMISSIONS PROCESS.

Louisiana denies nonimmigrant aliens the opportunity to practice law within its borders. As a result, Tulane's international allure has been tarnished, affecting Tulane's ability to attract top talent, both internationally and within the United States. Following *In re Bourke*, Tulane has experienced a nine-percent decrease in international J.D. applicants and a forty-percent decrease in international LL.M. applicants. Tulane concedes that the events surrounding September 11, 2001 have likely contributed to the decline in foreign applicants. Given the events' negative impact on international recruiting, however, the recent decision further impedes Tulane's efforts to recruit international students.

Tulane's ability to attract foreign students directly correlates to Tulane's ability to attract top U.S. candidates. Almost half of Tulane's incoming class said that a main reason they selected Tulane was for its international law programs. Studies have shown that "[t]hese programs internationalize the student bodies of law schools which schools use as evidence of their international and even global characters . . . . [T]he significance of the international label addresses a law school's ability to attract applicants for its JD program as well." Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers* 15-16 (Working Paper 942) (2005), *available at* http://law.bepress.com/expresso/eps/942 (last visited Aug. 1, 2006).

Correspondingly, Tulane's ability to place foreign lawyers in employment, including employment in Louisiana, is causally related to the caliber of students that it attracts, whose characteristics, in turn, impact their success in finding employment. Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 Fordham Int'l L.J. 1039, 1057 (2002). "The more well-known a law school is among foreign lawyers, the more likely it can be selective

among applicants with regard to [student characteristics that impact their employment success]." *Id.* Accordingly, Tulane's ability to attract well-qualified foreign students helps it further promote its international programs. The decision has an undisputable negative impact on Tulane's ability to recruit top students.[25] A ruling with such negative potential impact on the education and practice of law in the United States requires this Court to grant certiorari.

III. THE DECISION BELOW IMPACTS THE QUALITY OF EDUCATION PROVIDED TO TULANE LAW STUDENTS.

As part of its treasured history and educational mission, Tulane and its students have always valued the benefits that result from the presence of international students inside and outside classroom. Research has verified the importance and benefits of all forms of diversity in the student body, including the benefits of multicultural and multiracial perspectives that foreign students bring to the classroom. *See, e.g.*, Patricia Gurin, et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72(3) Harv. Educ. Rev. 330 (2002); *see also* Morgan Appel, et al., Association of American Colleges and Universities, *The Impact of Diversity on Students: A Preliminary View of the Research Literature* (1996). The decision below impedes the

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[25] "In the competition among U.S. law schools for transnational graduate students, it appears that location as it relates to bar admission rules matters. Schools located in New York are disproportionately successful in placing their graduates in jobs in New York." Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers* 30 (Working Paper 942) (2005) (discussing the requirements for international students who want to sit for the New York bar) *citing* Carole Silver, *The Case of the Foreign Lawyer: Internationalizing the U.S. Legal Profession*, 25 Fordham Int'l L.J. 1039 (2002).

ability to create and maintain such a diverse setting, disregarding this Court's prior statements and greatly impeding Tulane's ability to carry forward its mission.

International students in both the J.D. and LL.M. programs enroll in all classes at Tulane.[26] Tulane encourages this diversity in the classroom because international students bring a comparative perspective to share with other students. The benefits of student body diversity have recently been noted by this Court: "[t]hese benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'" *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (footnotes and citations omitted). Although the Court in *Grutter* addressed racial diversity issues, the Court still noted the importance of educating law students to do business in a global economy. "These benefits are not theoretical, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* The *Grutter* analysis is applicable to this case because, "[c]lassifications based on alienage, *like those based on nationality or race*, are inherently suspect and subject to close judicial scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (emphasis added). One of the best ways to train law students to practice law in a global marketplace is to have an internationally diverse student body, as Tulane has always endorsed.

Tulane's international students contribute significantly to the educational environment in numerous other ways. The international students often serve as special editors on Tulane's journals, assisting in the production of the many

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[26] Any limitations to enrollment are related to LL.M. and J.D. status rather than to international status.

articles published in these journals by foreign scholars.[27] The international students also teach popular courses on legal language to the J.D. students. In these legal language courses, the international students teach the vocabulary necessary for communicating in legal environments of foreign countries. The J.D. students are so motivated to learn from their fellow international students that they take these classes on a not-for-credit basis. U.S. students value the opportunity to learn from their international counterparts who have first-hand knowledge of the legal language being taught. They do so knowing that these courses provide valuable tools for their legal careers. Indeed, today many Tulane alumni use these skills as they live and practice abroad as members of the bars in a number of foreign countries.

Given the significant impact on the educational environment, combined with this Court's recent acknowledgment of the importance of providing a diverse educational setting to prepare lawyers to work in a globalizing world, this Court should grant certiorari to address the Fifth Circuit's decision, which causes a severe negative impact on the educational opportunities available to students, and disregards this Court's statements regarding the importance of a diverse setting for legal education.

IV. THE DECISION BELOW WILL DIRECTLY IMPACT THE QUALITY OF THE LOUISIANA STATE BAR AND THE LEGAL SERVICES THE BAR PROVIDES.

Fostering diversity is not merely for the purpose of conducting a classroom exercise. Tulane promotes student diversity in hopes that the benefits of exposure to varied perspectives will follow into legal practice. Tulane has made this a reality, and now has alumni practicing law in all regions

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[27] *See, e.g.*, Centennial World Congress on Comparative Law Papers, 75 Tul. L. Rev. 859-1245 (2001).

of the world. This Court has recognized the continuity between legal study and legal practice. *See, e.g.*, *Grutter*, 539 U.S. at 332-33 ("Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity."). Likewise, a primary aim of the Louisiana State Bar is to "encourage collegiality among its members."[28] The recent ruling prevents Louisiana practitioners from achieving that mission by denying nonimmigrant aliens living in Louisiana the opportunity to practice law, in contradiction to Congressional authorization.[29]

The variety and quality of Tulane's U.S. applicants could also be impaired as the number of qualified foreign students applying to Tulane declines. The negative impact of the recent ruling on Tulane's international program may discourage U.S. applicants from attending Tulane. As Tulane contributes significantly to the education of the members of the Louisiana Bar, any negative impact on admissions at Tulane is likely to impact the Louisiana Bar.

As this Court recognized over a quarter of a century ago, "[t]he 'increased specialization and high mobility' of today's Bar is a consequence of the dramatic change in the demand for legal services that has occurred during the past century." *Leis v. Flynt*, 439 U.S. 438, 450 (1979) (quoting *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1966)). Today, the globalized world economy demands that some lawyers practicing in the United States have particular familiarity with both domestic and international legal issues. In fact, "[l]awyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country."

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[28] *See* Louisiana State Bar Mission Statement, *available at* http://www.lsba.org/association/association.html (last visited July 27, 2006).

[29] *See infra* footnote 34.

In re Griffiths, 413 U.S. at 724 n.14. In these cases, it is in the client's best interest that his lawyer understands both the domestic and international implications of their representation.

A qualified nonimmigrant alien attorney's innate understanding of his native legal system and culture will often make him best suited to assist U.S. clients in negotiating foreign legal issues.[30] Similarly, nonimmigrant alien lawyers are uniquely positioned to represent foreign clients in U.S. litigation or transactions. Moreover, nonimmigrant aliens are particularly situated to provide representation for other immigrants residing in the State. These clients are likely to feel more comfortable dealing with attorneys who are from their home country, and who understand their particular culture, situation, and needs. The Fifth Circuit's approval of the reinterpretation of Section 3(B) discourages international students from seeking the legal education necessary to effectively negotiate the U.S. legal system. As a result, non-immigrant aliens' specialized knowledge will not be utilized and U.S. and international clients will not benefit from their expertise.

The State's many immigrant, indigent, or underrepresented clients will be particularly harmed by the Fifth Circuit's ruling. Nonimmigrant aliens, like petitioners in this case, often represent U.S. clients that may not otherwise receive legal aid.[31] This Court has recognized the specific need for such lawyers:

> Out-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases,

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[30] Consider LA. REV. STAT. tit. 37, ch. 4 app., art. 14, § 11, which provides for licensing of legal consultants in foreign law.

[31] *See* Joe Gyan, Jr., *Court Hears Challenge to Lawyers Ban*, Baton Rouge Advocate (October 6, 2004); Susan Finch, *Judge Deals Setback to Foreign Lawyers: Ban from Louisiana Bar Exam is Upheld*, New Orleans Times Picayune (July 3, 2003).

> representation by nonresident counsel may be the only means available for the vindication of federal rights. *See Leis v. Flynt,* 439 U.S., at 450 . . . (STEVENS, J., dissenting). The lawyer who champions unpopular causes surely is . . . important to the 'maintenance or well-being of the Union,' *Baldwin,* 436 U.S., at 388 . . .

Sup. Ct. of New Hampshire v. Piper, 470 U.S. 274, 281 (1985). As exemplified by the present nonimmigrant alien petitioners, "[t]he interest these lawyers seek to vindicate is not merely the pecuniary goal that motivates every individual's attempt to pursue his calling," rather, "[i]t is the profession's interest in discharging its responsibility for the fair administration of justice in our adversary system." *Leis,* 439 U.S. at 452-53 (STEVENS, J., dissenting). The benevolent work by nonimmigrant aliens, like the petitioners, is frustrated by the Fifth Circuit's ruling in this case, and the Louisiana residents most in need will be negatively impacted, particularly in a time of great need for legal aid and assistance in the state of Louisiana.

V. THE DECISION BELOW WILL ADVERSELY AFFECT THE ECONOMY.

The Fifth Circuit's affirmation of the reinterpretation of Section 3(B) violates the Supremacy Clause because it directly contradicts federal law.[32] The result is a significant negative impact on the economy. As the Economic Report of the President recognizes, "high-skilled immigrant workers are a significant part of the skilled U.S. workforce. . . . Promoting a flexible and skilled labor force . . . through policies that attract the world's best and brightest to our shores . . . will ensure that the United States remains a competitive leader in

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[32] *See* Petition for Writ of Certiorari, *Wallace v. Calogero* (filed in the Supreme Court June 23, 2006) (No. 05-1645) at 11 (arguing that "Congress has established a comprehensive statutory scheme to govern the treatment of aliens and immigrants in the United States").

this rapidly changing world economy." 2006 Economic Report of the President at 57, 63-64. The Louisiana Bar's focus on the alleged transience of nonimmigrant aliens ignores the economic benefits of foreign workers, particularly given that there is no indication that nonimmigrant aliens disproportionately blight the legal community through lawyer nonfeasance or malfeasance.[33] Thus, the ruling below inhibits the promotion of a flexible and skilled workforce by preventing highly-skilled foreign workers from contributing to the legal community as members of the Louisiana Bar.

In addition to denying nonimmigrant alien lawyers the opportunity to seek state licensure,[34] the ruling also dis-

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[33] Furthermore, the reasoning of the Louisiana Supreme Court ignores the transient nature of other classes of citizens and immigrant attorneys that practice in Louisiana. For example, the Louisiana Supreme Court failed to articulate why nonimmigrant aliens are more susceptible to being "international transients" compared to U.S. citizens with dual citizenship living in their foreign country of citizenship, or even permanent resident aliens who maintain the citizenship of their home country. "A lawyer must remain accessible to his clients and subject to the control of the bar. . . . To begin with, however, the possibility that an alien lawyer might voluntarily return to his native land is not significantly different, in today's highly mobile society, from the possibility that a citizen lawyer might voluntarily move to a different jurisdiction in the United States, e.g., in search of better employment opportunities." *Raffaelli*, 496 P.2d at 1271-1272.

[34] An H-1B visa holder is admitted to the United States for the purpose of engaging in a specialty occupation, which includes law. 8 U.S.C. §1101(a)(15)(H)(i)(b). An alien is required to obtain "full state licensure to practice the occupation, if such licensure is required to practice in the occupation," and must have that license prior to approval of the H-1B visa. 8 U.S.C. §1184(i)(2)(A); 8 C.F.R. §214.2(h)(4)(v). The rationale that a nonpermanent resident alien is merely temporarily in the state ignores the Immigration and Nationality Act provision for adjustment of status which allows a non-immigrant alien to adjust their status to permanent resident. *See* 8 U.S.C. § 1255(a). For further discussion of violation of the Supremacy Clause, *see* Petition for Writ of Certiorari,

courages employer sponsorship of nonimmigrant aliens for legal, permanent residency. Between 2000 and 2004, about fifteen-percent of new permanent residents received green cards through employment-based immigration. 2006 Economic Report of the President at 60. In 1990, Congress enacted a priority system with employment-based categories for granting aliens permanent residence. One employment-based category makes available 40,000 visas per year to advanced degree professionals who are either sponsored by their employer, or who are of exceptional ability.[35]

State bar membership is a prerequisite to practicing law. By excluding nonimmigrant aliens from bar membership, the 2002 reinterpretation of Section 3(B) precludes such aliens from obtaining a nonimmigrant work visa to practice law even though federal law explicitly authorizes such visas for lawyers. If this interpretation is extended to other professional occupations, Louisiana would effectively eliminate federal nonimmigrant work visas from issuing for otherwise qualified nonimmigrant aliens residing and seeking to work in specialized professions in Louisiana.

Wallace v. Calogero (filed in the Supreme Court June 23, 2006)(No. 05-1645) at 11-15.

[35] *See* U.S. Citizenship and Immigration Services, Employment-based Permanent Residence, Employer Information Bulletin 14, March 16, 2005. Qualifying as an alien of exceptional ability must be demonstrated by a minimum of three of the following types of documentation: (1) Official academic record demonstrating that alien has earned degree(s); (2) Statement(s) from employer(s) demonstrating at least ten years of full-time experience in the field; (3) License or certification for professional practice; (4) Salary or other remuneration for services commensurate with that of a professional; (5) Membership in professional association(s); and (6) Recognition by peers or government/professional entities for achievements and contributions. *Id.* The reinterpretation of Section 3(B) sets up a conundrum not intended by Congress. Without a permanent resident visa, nonimmigrant aliens cannot qualify for bar licensure. At the same time, they will have difficulty qualifying for the visa without a bar license.

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 416 (1948). This prohibition on advancement in the profession in turn will lead to lower employment and fewer employers willing to sponsor a nonimmigrant resident alien for employment based immigration. This cannot be the result that the Constitution permits, particularly in light of this Court's precedent regarding immigrants and the right to work. *See id.* at 419 (finding that statute denying lawful alien inhabitants the right to engage in an occupation violated the Equal Protection Clause and Supremacy Clause); *see also Truax*, 239 U.S. at 41-42 (holding statute that discriminated against resident invalid as denying equal protection and violating the Supremacy Clause under the law because lawful residents should not be denied "entrance and abode").

CONCLUSION

For all of the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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